IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1511

CHARLES MURPHY, et al.,
Petitioners,

vs.

THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

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The Petitioners, Charles Murphy, et al., pray that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Eighth Circuit entered on January 5, 1979, overruling Petitioners' Motion for Recusal, the judgment and opinion of January 19, 1979, and the order of February 6, 1979, overruling the Motion for Rehearing.

OPINIONS BELOW

The order of the Court of Appeals of January 5, 1979, the decision of January 19, 1979, and the order of February 6, 1979 are not reported and appear in the appendixes to this

Petition, number 10, page A-55, number 11, pages A-56-57, and number 12, page A-58. The order of the District Court of August 11, 1978 is not reported, and appears in the appendixes to this Petition as number 7, page A-46. The Memorandum Opinion of the District Court is not reported, and is set out in the appendixes to this Petition, as number 8, pages A-47-51.

JURISDICTION

The order of the Court of Appeals for the Eighth Circuit was entered on January 5, 1979 (appendix number 10, page A-55); the judgment and order of the Court of Appeals was entered on January 19, 1979 (appendix number 11, pages A-56-57); and the Motion for Rehearing was overruled on February 6, 1979 (appendix number 12, page A-58).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the judges of the Court of Appeals, against whom a Motion for Recusal had been filed, properly overruled Appellants' Motion for the recusal of Judges Lay and Bright, which verified Motion alleged that those judges have formed a personal bias or prejudice against the actions and attitudes of a party, and that the judges have prejudged and formed opinion as to the merits of disputed evidentiary facts concerning the proceedings.

2. Whether the Court of Appeals erred in determining that the action was removable to the Federal District Court for the Eastern District of Missouri from the Circuit Court of the City of St. Louis, Missouri,

a) When the Defendants alleged Federal Jurisdiction under the terms of 28 U.S.C. 1331 and 28 U.S.C. 1441.

b) When the Defendants were allowed to amend their Petition for Removal after the time within which they were required to file a responsive pleading had expired and alleged federal jurisdiction under the terms of 28 U.S.C. 1343 and 28 U.S.C. 1443, and

c) When Plaintiffs' Petition did not state separate and independent claims or causes of action.

3. Whether the Court of Appeals erred in determining that, when ruling upon a Motion to Dismiss, a District Court may consider matters beyond the Petition, including affidavits and judicial records in other proceedings.

4. Whether the Court of Appeals erred in determining that the District Court could judicially note that the numerical extent of employee assignments and transfers, based on race alone, were completely necessary to comply with a purported consent decree in a separate action.

5. Whether the Court of Appeals erred in determining that a cause of action can be barred by laches prior to the expiration of the statute of limitations, in the absence of a showing that Defendants were either damaged by or relied upon Plaintiffs' inactivity.

6. Whether an employer may use race as the sole criteria for assignment or transfer of employees in the absence of an acknowledgment or finding of prior racial discrimination by the employer.

7. Whether a federal court may judicially approve a consent decree requiring the assignment and transfer of employees solely on a racial basis in the absence of a determination that the assignment and transfer is required to overcome prior discriminatory conduct on the part of the employer.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1.) 28 U.S.C. 455(a): Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(2.) 28 U.S.C. 455(b): He shall also disqualify himself in the following circumstances:

1. Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings.

(3.) 28 U.S.C. 1331(a): The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of Ten Thousand and No/100 Dollars ($10,000.00), exclusive of interest and costs, and arises under the constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(4.) 28 U.S.C. 1343: The district court shall have original jurisdiction of all civil actions authorized by law to be commenced by any person:

3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, customer usage, of any right, privilege, or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

4) To recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights, including the right to vote.

(5.) 28 U.S.C. 1441:

a) Except as otherwise provided by act of Congress, any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the Defendant or the Defendants to the district court of the United States for the district and division embracing the place where such action is pending.

b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States shall be removable without regard to the citizenship or residents of the parties. Any other action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is pending.

c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(6.) 28 U.S.C. 1443: Any of the following civil actions or criminal prosecutions, commenced in a state court, may be removed by the Defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

2) For any act under color of authority derived from any law providing for equal rights or for refusing to do any act on the grounds that it would be inconsistent with such law.

STATEMENT OF THE CASE

The original action was filed, by verified petition, in the Circuit Court for the City of St. Louis, Missouri, the state trial court, on June 12, 1978, alleging that the Defendants, the Board of Education for the City of St. Louis, and its officers and agents and employees, had prepared and were using separate lists for the assignment and transfer of its employees, which lists were compiled and based on the race of the employees. The Petition alleged that the Plaintiffs were employees of the Defendant, Board of Education, that Defendants, Benson, Bond, Busse, Grich, Klinefelter, Moser, Nicholson, Schlafly, Smith, Springer, Weir, and Williams constituted the Board of Education of the City of St. Louis, and that Defendant, Wentz, was the Superintendent of Schools, that Defendant, Neel, was the Associate Superintendent of Schools in charge of the administration and supervision of personnel matters for the Board. The verified Petition further alleged that the Defendant, Board of Education, had classified its employees into two categories, those in a general teaching capacity and possessing a certificate issued by the State of Missouri, and all other employees who were referred to as noncertificated employees. The Petition alleged that the Board had established certain criteria in determining employee rights and procedures to be followed in the assignment or transfer of employees to job locations. State statutes and city ordinances further make certain employment practices unlawful, amongst which are the classification of employees by race and the establishment of separate lists for employees by race to be utilized in determining promotion, transfer, or assignments.

Plaintiffs alleged that the Defendants had in fact established separate lists of job locations and categories, which lists were prepared based exclusively on race, color, ancestry, and national origin of its employees, and had limited the job sites, qualifications, and locations available to its employees based

exclusively upon this discriminatory list. Plaintiffs further stated that the Defendants were assigning and threatening to assign Plaintiffs to various job sites based exclusively on their race contrary to Defendants' own established criteria, applicable municipal ordinances, State Statutes, and Federal Statutes and Constitutional provisions. On June 12, 1978 the State Circuit Court ordered the Defendants to show cause on June 29, 1978 why they should not be enjoined from assigning or threatening to assign Plaintiffs to job sites based on their race.

On June 23, 1978 Defendants filed a Petition for Removal of the cause from the Circuit Court of the City of St. Louis, Missouri to the United States District Court for the Eastern District of Missouri, Eastern Division, alleging that the Federal District Court had original jurisdiction of the cause under the provisions of 28 U.S.C. 1331 and 28 U.S.C. 1441.

On June 27, 1978, Plaintiffs filed their Motion to Remand the cause to state court.

The Defendants made no return to the order to show cause on or before June 29, 1978, and never denied any of the allegations of the verified petition.

On July 10, 1978, eleven (11) days after the return date to the show cause order, the Defendants obtained the permission of the District Court to amend their Petition for Removal, adding as additional grounds for their Petition for Removal the provisions of 28 U.S.C. 1343(3) and (4) and 28 U.S.C. 1443(2).

On July 10, 1978, the Defendants also filed their Motion to Dismiss Plaintiffs' cause of action for failure to state a claim upon which relief may be granted.

On August 11, 1978, the Federal District Court for the Eastern District of Missouri entered an order denying Plaintiffs' Motion to Remand, sustaining Defendants' Motion to Dismiss, and

dismissing Plaintiffs' Petition with prejudice, and simultaneously entered its memorandum opinion.

Those orders were subsequently appealed to the United States Court of Appeals for the Eighth Circuit. On January 1, 1979, the composition of the panel assigned to hear the appeal was announced, designating Judges Lay, Bright, and Stephenson to hear and decide the appeal. On January 2, 1979, Plaintiffs filed a Motion for Recusal of Judges Lay and Bright, two of the three judges assigned to the panel to hear the appeal, which Motion was denied by the Court of Appeals by its order of January 5, 1979.

The panel of the United States Court of Appeals for the Eighth Circuit, per curiam, affirmed the judgment and order of the Federal District Court by its order of January 19, 1979. The subsequent Motion for Rehearing En Banc was denied by the order of the Court of Appeals of February 6, 1979.

REASONS FOR GRANTING THE WRIT

The judgment of the Eighth Circuit Court of Appeals should be reviewed because:

A) Two of the three sitting Judges of the Court of Appeals which ruled upon this cause, improperly failed to recuse themselves in violation of 28 U.S.C. 455.

B) The Judges of the Court of Appeals erred in determining that this action was removable to the Federal District Courts from the Missouri State Circuit Court under the provisions of 28 U.S.C. 1331 and 28 U.S.C. 1441.

C) The Judges of the Eighth Circuit Court of Appeals erred in determining that the amendment of the Petition for Removal, after the time within which a responsive pleading was required, was permissible, and that removal was proper under the terms of 28 U.S.C. 1343 and 28 U.S.C. 1443.

D) The Judges of the Eighth Circuit Court of Appeals erred in determining that Plaintiffs' Petition stated separate and independent claims or causes of action and were thus all removable.

E) The Judges of the Court of Appeals erred by applying the rules applicable to a Motion for Summary Judgment in ruling upon the Motion to Dismiss.

F) The Judges of the Court of Appeals erred in determining that the District Court could judicially note that the numerical extent of employee assignments and transfers were necessary to comply with the purposed consent decree without the hearing of any evidence.

G) The Judges of the Court of Appeals erred in determining that Plaintiffs' cause of action can be barred by laches prior to the expiration of the Statute of Limitation,

in the absence of any showing that Defendants were either damaged by or relied upon Plaintiffs' inactivity.

H) The Judges of the Court of Appeals erred in determining that an employer may use race as the sole criteria for assigning or transferring its employees in the absence of any acknowledgement or finding of prior racial discrimination by the employer.

I) The Judges of the Court of Appeals erred in determining that a Federal District Court may judicially approve a consent decree requiring the assignment and transfer of employees based solely on their race in the absence of a judicial determination or admission that the assignment and transfer are required to overcome prior discriminatory conduct on the part of the employer.

A

The Judges of the Court of Appeals, Which Ruled Upon This Cause, Improperly Failed to Recuse Themselves in Violation of 28 U.S.C. 455.

The Supreme Court of the United States has not previously considered the criteria to be used by Federal Appellate Judges in considering the appropriateness of their recusal. There are, in fact, but a few decisions by the various Courts of Appeal as to the criteria to be used by District Court judges in their recusal based on bias or prejudice. Because of the growing number of instances in which District Court judges and judges of the Courts of Appeal are being challenged on the basis of possible bias, prejudice, or the appearance of impropriety, it becomes essential for this Court to set out a dispositive statement as to the guidelines and circumstances under which federal judges must recuse themselves.

The current statute on recusal of federal judges is contained in 28 U.S.C. 455. The most recent amendment to that provision

was contained in P.L. 93-512, Act of December 5, 1974. Only four circuits to date have discussed the provisions and language of that statute. The congressional intent of Public Law 93-512 can be found in the language of House Report 93-1453, 3 U.S. Cong. and Adm. News, 1974, page 6351. The House Judiciary Committee stated that:

> "The purpose of the amended bill is to amend Section 455 of Title 28 United States Code, by making the statutory grounds for disqualification of a judge in a particular case conform generally with the recently adopted canon of the Code of Judicial Conduct which relates to the disqualification of judges for bias, prejudice, or conflict of interest." Ibid. page 6351.

The Judiciary Committee pointed out that prior to 1974,

> "The existence of dual standards, statutory and ethical, couched in uncertain language, has had the effect of forcing a judge to decide either the legal issue or the ethical issue at his peril. He was occasionally subjected to a criticism by others who necessarily had the benefit of hindsight. The effect of the existing situation, if not only to place the judge on the horns of a dilemma, but in some circumstances, to weaken public confidence in the judicial system." Ibid., page 6352.

After then discussing the history of the creation of the Code of Judicial Conduct promulgated by the American Bar Association in August of 1972, the House Judiciary Committee also pointed out that the administrative office of the United States Courts has:

> "Made applicable to all Federal Judges the new code of judicial conduct, including Canon 3(C) relating to disqualification of judges." Ibid., page 6353.

The House Judiciary Committee pointed out specifically that,

> "Subsection (a) of the amended Section 455 contains the general, or catch-all, provision that a judge shall disqualify himself in any proceedings in which 'his impartiality might reasonably be questioned.' This sets up an objective standard, rather than the subjective standard set forth in the existing statute through the use of the phrase 'in his opinion.' This general standard is designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable, factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case. The language also has the effect of removing the so-called 'duty to sit' which has become a gloss on the existing statute. See *Edwards v. United States* (5th Cir. 1964), 334 Fed. 360. Under the interpretation set forth in the *Edwards* case, a judge, faced with a close question on disqualification, was urged to resolve the issue in favor of a 'duty to sit.' Such a concept has been criticized by legal writers and witnesses at the hearing were unanimously of the opinion that elimination of this 'duty to sit' would enhance public confidence in the impartiality of the judicial system." Ibid., pages 6354-6355.

In addressing the question as to the extent of personal knowledge required of a judge before he ought to recuse himself, the House Judiciary Committee pointed out that one of the few exceptions to the general rule that personal knowledge of disputed evidentiary facts would disqualify the judge is the question of a judge dealing with summary contempt in open court before them. The committee observed that,

> "The summary contempt procedure has been and remains an indispensable exception to the usual procedures and the bill would not affect it." Ibid., page 6355.

There could be no question but that the provisions of 28 U.S.C. 455 deal with appellate judges in view of the language of the Judiciary Committee.

> "Under subsection (a), coverage of the amended statute is made applicable to magistrates and referees in bankruptcy, as well as Supreme Court justices and all other federal judges." (3 U.S. Cong. & Adm. News, 1974, at page 6356.)

The few Courts of Appeals decisions on the point would support Plaintiffs' position. The First Circuit held in *U. S. v. Cowden,* 545 F.2d 257 (1 C.A., 1977), that a judge need not recuse himself based on the fact that he presided over the two prior trials of four co-defendants. The First Circuit did provide some helpful dictum when it pointed out that:

> "The proper test, it has been held, is whether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself or even in the mind of the litigant filing the motion under 28 U.S.C. 455, but rather in the mind of the reasonable man." *U. S. v. Cowden,* 545 Fed.2d at 265.

The First Circuit held that the mere fact that the judge presided at two prior trials involving the same general criminal activity would not create such a reasonable doubt in the mind of the reasonable man.

The only decision from the Fourth Circuit is not germane to this action. In *In Re: Virginia Electric and Power Company,* 539 F.2d 357 (4 C.A., 1976), the judges discussed the extent of the possible pecuniary interest which might befall a sitting judge if he presided at a trial. In the *Virginia Electric and Power Company* case, the Plaintiffs were suing the Defendant contractor for damages. If the Plaintiff was successful,

it was possible that the customers of Virginia Electric and Power Company, including the District Court Judge who would preside at the trial, might receive a reduction in their electric utility bills ranging from between $70.00 and $100.00, and that refund might be spread out over a 40 year period. The Court, in ruling that the District Court judge should not have disqualified himself, held that the 1974 amendment to 28 U.S.C. 455 was not applicable since the case was filed before the 1974 amendment, that the order disqualifying all judges in Virginia was overly broad, and that the possibility of the $70.00 to $100.00 refund was so minimal as to constitute de-minimis.

The Fifth Circuit, on two occasions, has discussed the provisions of 28 U.S.C. 455. In *Davis v. Board of School Commissioners*, 517 F.2d 1044 (5 C.A., 1975), the Fifth Circuit pointed out that:

> "Section 455 is the statutory standard for disqualification of a judge. It is self-enforcing on the part of the judge. It may also be asserted by a party . . . through assignment of error on appeal, *U. S. v. Seiffert*, 5th Cir., 1974, 501 F.2d 974; *Shadid v. Oklahoma City*, 10 Cir. 1974, 494 F.2d 1267, 1268 . . ." *Davis v. Board of School Commissioners*, 517 F.2d at 1051.

The Fifth Circuit then went on to point out that:

> "We thus hold that an appellate court, in passing on questions of disqualification of the type here presented, should determine the disqualification on the basis of conduct which shows bias or prejudice or lack of impartiality by focusing on a party rather than counsel. The determination should also be made on the basis of conduct extra judicial in nature as distinguished from conduct within the judicial context." Ibid. at page 1052.

The Court also pointed out that:

> "The new language was designed to substitute the reasonable, factual basis—reasonable man test in determining disqualification for the subjective 'in the opinion of the judge' test in use prior to the amendment. (Citing cases.) It was also intended to overrule the so-called duty to sit decision." Ibid. at page 1052.

In the other Fifth Circuit case, the personal bias of the judge was considerably more obvious. In *United States v. Brown*, 539 F.2d 467 (5 C.A., 1967), the trial judge was heard to have said, prior to the commencement of the original trial, that "he was going to get that nigger." After the defendant was convicted, the defendant's attorney filed a motion to recuse the judge from ruling upon the post-trial motions. The post-trial motions were then heard by another judge. One of these post-trial motions was directed at the personal bias of the trial judge. The substitute judge, who ruled upon the post-trial motions, found that the trial judge was indeed biased against the defendant, but held that the record disclosed that the defendant got a fair trial in any event. In reversing, the Fifth Circuit pointed out that:

> "The truth pronounced by Justinian more than a thousand years ago that 'impartiality is the life of justice' is just as valid today as it was then. Impartiality finds no room for bias or prejudice. It countenances no unfairness and upholds no miscarriage of justice. Bias and prejudice can deflect the course of justice and effect the measure of its judgment. If the judge finds himself possessed of those sentiments, he should recuse himself; or, if he does not, confront the likelihood of proceedings under the statute to require him to do so." *U. S. v. Brown*, 539 F.2d at 469.

The Court then went on to quote an earlier case when it held that:

> "For the proper administration of justice requires of a judge not only actual impartiality, but also the appearance of a detached impartiality.

"Like statements of the principal as to the 'appearance of justice' within the fair trial concept, are found in many other decisions and have now been codified in the new recusal statute, which requires mandatory disqualification of a judge 'in any proceedings in which his impartiality *might reasonably be questioned*' or 'where he has a personal bias or prejudice concerning a party.' To say more will unduly lengthen this decision." Ibid. at 469-470.

The only case coming out of the Seventh Circuit was one of similarly blatant circumstances. In *S.C.A. Services, Inc. v. Morgan*, 557 F.2d 110 (7 C.A. 1977), a Writ of Mandamus was issued ordering the trial judge to disqualify himself from proceeding in a case where the defendant was represented by a law firm, a partner in which was a brother to the presiding trial judge. The Seventh Circuit held that the judge's brother's financial interest in the litigation was sufficient to require the trial judge to disqualify himself.

In the case being presented to this Court, the plaintiff pointed out to the Court of Appeals that two of the three judges who were sitting to hear the appeal had formed an opinion as to disputed evidentiary facts, which opinion was publicly stated and published in their opinion of *Liddell, et al. v. Caldwell, et al.*, 546 F.2d 768 (8 C.A., 1976) cert. den'd. 433 U.S. 914, 1977. Specifically the judges were of the opinion that:

"The parties were faced with an admittedly de jure segregated school system whose district lines had been coterminus with those of the city since 1876." *Liddell v. Caldwell*, 546 F.2d at 772.

Similarly, Judges Lay and Bright pointed out that:

"As we stated earlier, we do not believe that the merits of the Consent Decree are before us, since we consider the decree interlocutory in nature. We do observe, however,

that if the overall plan to be submitted by the board contains major deficiencies in the respects asserted, the claim will encounter serious constitutional objection." Ibid. at page 773.

Given the extent of Judges Lay and Bright's preconceptions and apparent extrajudicial knowledge of the proceedings, they ought to have recused themselves, having been challenged by the motion to disqualify. They did not, and this Court should therefore consider the appropriateness of accepting this case to discuss the parameters within which Federal judges ought to grant recusal motions.

B

The Judges of the Court of Appeals Erred in Determining That This Action Was Removable to the Federal District Courts From the Missouri State Circuit Court Under the Provisions of 28 U.S.C. 1331 and 28 U.S.C. 1441.

C

The Judges of the Eighth Circuit Court of Appeals Erred in Determining That the Amendment of the Petition for Removal, After the Time Within Which a Responsive Pleading Was Required, Was Permissible, and That Removal Was Proper Under the Terms of 28 U.S.C. 1343 and 28 U.S.C. 1443.

D

The Judges of the Eighth Circuit Court of Appeals Erred in Determining That Plaintiffs' Petition Stated Separate and Independent Claims or Causes of Action and Were Thus All Removable.

While your Petitioners have separately listed these three points for purposes of clarity, they are sufficiently interrelated to be discussed together.

Petitioner first suggests that the rather unusual procedure of allowing the Petition for Removal after the return date for the show cause order and after the filing of the Motion to Remand was improper. It must be pointed out that the District Court referred to 28 U.S.C. 1343(3) and (4) in denying the Motion to Remand. Yet 28 U.S.C. 1343 was not the basis for the Removal Petition. It is important to note that the District Court and Court of Appeals both relied on 28 U.S.C. 1343 to justify the removal. The question that this Court should answer is whether such unusual procedures are permissible.

But even if such unusual procedures are permissible, the question of "separable" and "separate" causes of action was also critical to the determination of the issues in this cause.

This Court last addressed the question as to the removability of cases from the state to the Federal Court in 1951 in *American Fire and Casualty Company v. Finn*, 341 U.S. 6, 95 L.Ed. 702 (1951). That decision spoke with unusual clarity and decisiveness concerning the 1948 amendment to the Federal procedural requirements on removal of cases. Since that time, several of the Circuits and many of the Districts have struggled with the meaning and the scope within which state causes can be removed to the Federal Courts. Legal scholars have written of the dangers of which District Courts need to be aware in granting Petitions for Removal, and have frequently cautioned against the ease with which removal actions have occurred. The removal statutes are set out in 28 U.S.C. 1441 and condition removal upon the existence of independent jurisdiction in the Federal Court over the original cause. If the Federal Courts would have had jurisdiction of the original cause, then the case could have been removed. There is an obvious caveat to that general rule, and that caution is set out in 28 U.S.C. 1441(c). This is the so-called separate and independent claim or cause of action provision. This Court quite succinctly stated the distinction of the criteria under the pre-1948 and post-1948 amendments. In discussing the difference, this Court stated:

> "A separable controversy is no longer an adequate ground for removal unless it also constitutes a separate and independent claim or cause of action. (Cases cited.) Congress has authorized removal now under Section 1441 (c) only when there is a separate and independent claim or cause of action. Of course, a separate cause of action restricts removal more than a separable controversy . . . The addition of the word 'independent' gives emphasis to congressional intention to require more complete disassociation between the federally cognizable proceeding and those cognizable only in the state courts before allowing removal." *American Fire and Casualty Company v. Finn*, 341 U.S. at pages 11-12, 95 L.Ed. at page 707.

In describing what was meant by separate causes of action, this Court went on to say:

> "Upon principal, it is perfectly plain that the respondent suffered but one actionable wrong and was entitled to but one recovery, whether his injury was due to one or the other of several distinct acts of alleged negligence or to a combination of some or all of them. In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex.
>
> "A cause of action does not consist of facts, but of an unlawful violation of a right which the facts show . . . considering the previous history of 'separable controversy' the broad meaning of 'cause of action' and the congressional purpose of the revision resulting in 28 U.S.C. Section 1441(c), we conclude that where there is a single wrong to plaintiff for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under Section 1441(c)." 341 U.S. at pages 13-14, 95 L.Ed. 708-709.

The distinction between separate and separable might best be illustrated by this Court's discussion in the *Hurn* case.

In discussing the case before the Court in *Hurn*, the Court stated:

> "The primary relief sought is an injunction to put an end to an essentially simple wrong, however differently characterized, not to enjoin distinct wrongs constituting the basis for an independent cause of action. The applicable rule is stated, and authorities cited in *Baltimore S. S. Co. v. Phillips*, 274 U.S. 316, 71 L.Ed. 1069, 47 S.Ct. 600. 'A cause of action does not consist of facts, this Court there said (page 321) but of the unlawful violation of a right which the facts show. The number and the variety of facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is a violation of but one right by a single legal wrong . . . The facts are merely the means and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear.' Thus tested, the claims of infringement and of unfair competition averred in the present bill of complaint are not separate causes of action, but different grounds asserted in support of the same cause of action." 289 U.S. at pages 246-247, 77 L.Ed. 1154.

The intent of 28 U.S.C. 1441(c) was to limit the removal of cases. 14 Wright, Miller & Cooper, Federal Practice and Procedure, Section 3721, page 533. All doubts are to be resolved against removal. 14 Wright, Miller & Cooper, ibid., at pages 535-536. The party seeking the removal has the burden of establishing that removal is proper. 14 Wright, Miller & Cooper, ibid., at page 530. See also 32 AmJur 2d, Federal Practice and Procedure, Section 456.

The Eighth Circuit Court of Appeals affirmed the judgment of the district court, which relied upon *Gully v. First National Bank in Meridian*, 299 U.S. 109, 81 L.Ed. 70 (1936). In addition to the *Gully* case having been pre-1948, and thus not applicable, the languge of that case has consistently been urged to be read with a great deal of caution.

> "Unfortunately, although there is much that is valuable in *Gully*, there is also much that is questionable or misleading." 13 Wright, Miller & Cooper, Federal Practice and Procedure, Section 3562, page 405.

Even Professor Moore, in his treatise observed:

> "But where the plaintiff joins two or more defendants to recover damages for one injury, even though he charges them with joint and severable liability, or only severable liability, or charges them with liability in the alternative, there is no joinder of separate and independent causes of action within the meaning of Section 1441(c). At most a separable controversy is presented where several or alternative liability is alleged, and is no longer the basis for removal." 1A Moore's Federal Practice, ¶0.163(2), page 247.

This language was specifically cited with approval in *American Fire and Casualty Company v. Finn*, 341 U.S. 6, 14, 95 L.Ed. 702, 709 (1951).

Yet the Eighth Circuit in its per curiam opinion affirms the decision of the district court, which district court opinion concluded that:

> "If the adjudication of a claim depends upon the application of either the constitution or the laws of the United States, the entire case is removable." (Citing *Gully v. First National Bank in Meridian*, 299 U.S. 109 (1936).)

The several Federal Courts which have discussed the criteria for removal have noted the increasing presumption against removability.

"Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts in removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of the legislation." *Shamrock Oil & Gas Corp. v. Sheets,* 313 U.S. 100, 108-109, 85 L.Ed. 1214 (1941).

In the even earlier case of *Hurn v. Oursler,* 289 U.S. 238, 77 L.Ed. 1148 (1933), in discussing the pre-1948 Rule, Mr. Justice Southerland stated:

"But the rule does not go so far as to permit a Federal Court to assume jurisdiction of a separate and distinct non-Federal cause of action because it is joined in the same complaint with a Federal cause of action. The distinction to be observed is between a case where *two distinct grounds in support of a single cause of action* are alleged, one only of which presents a Federal question and the case where two separate and distinct causes of action are alleged, one only of which is Federal in character. In the former, where the Federal question averred is not plainly wanting in substance, the Federal Court, even though the Federal ground is not established, may nevertheless retain and dispose of the case upon the non-Federal grounds; in the latter it may not do so upon the non-Federal cause of action." 289 U.S. at pages 245-246, 77 L.Ed. at page 1154.

Prior to 1866 no case could be removed to the Federal courts unless diversity was present. In 1866 Congress authorized the removal of those portions of State court questions over which the Federal courts had jurisdiction, leaving the remainder in State court. Act of July 27, 1866, 14 Stat. 306. In 1878 Congress again amended the statute allowing the removal of the entire cause. Act of March 3, 1875, 18 Stat. Pt. 3, 470.

The statute remained unchanged until 1948 and engendered a great deal of confusion. Finally in 1948 the statute was again amended to avoid the confusion. The 1948 amendment is the current 28 U.S.C. 1441(c). "The Revised Statute not only introduces a new standard for removability, but also differs from its predecessors in that it applies to both diversity and Federal question cases, rather than embracing only separate and independent controversies between citizens of different states." 14 Wright, Miller & Cooper, *Federal Practice and Procedure,* Section 3724, page 622.

It would appear, therefore, that the Eighth Circuit and the Federal District Court for the Eastern District of Missouri are renouncing the 1948 amendments to 28 U.S.C. 1441 and are re-establishing the pre-1948 rule and the language of *Gully v. First National Bank in Meridian.*

It is, therefore, appropriate for this court to grant this Petition for Writ of Certiorari so that it may reverse and remand the Circuit Court of Appeals' decision and reaffirm this Court's decision in *American Fire and Casualty Company v. Finn,* 341 U.S. 6, 95 L.Ed. 702 (1951), or reconsider the propriety of the language of the 1951 decision.

E

The Judges of the Court of Appeals Erred by Applying the Rules Applicable to a Motion for Summary Judgment in Ruling Upon the Motion to Dismiss.

The Defendants in the original cause filed a document which they designated "Motion of Defendants, the Board of Education of the City of St. Louis, et al., to Dismiss This Action for Failure to State a Claim upon Which Relief May Be Granted and Suggestions in Support." The District Court, in its memorandum opinion, referred to its decision as a ruling "on the

Motion of Defendants to Dismiss for Failure to State a Claim." The Court ruled that, "It is further ordered that the Defendants' Motion to Dismiss be and is granted." Throughout the memorandum opinion of the District Court, the trial judge referred to the Motion to Dismiss. It is appropriate for this Court to again re-examine the scope of examination in considering a motion to dismiss. The question was presented on appeal to the Eighth Circuit. Yet clearly the District Court, with the approval of the Circuit Court of Appeals, went far beyond the face of the pleadings in determining whether the Plaintiffs had stated a cause of action. This court, as recently as 1974, has placed clear restrictions on the scope of the examination by federal courts in reviewing the sufficiency of a complaint.

> "When a federal court reviews the sufficiency of a complaint, before the reception of any evidence . . . its task is necessarily a limited one. The issue is not whether the plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely, but that is not the test. Moreover, it is well established that in passing on a motion to dismiss, whether on the grounds of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes,* 416 U.S. 232, 236, 40 L.Ed.2d 90, 96 (1974).

In considering motions to dismiss, the court's inquiry is restricted exclusively to the contents of the complaint and may not consider any possible defenses. 5 Wright & Miller, Federal Practice and Procedure, Section 1357, pages 592, 594, 605-606.

The gratuitous affidavit attached to Defendants' Motion to Dismiss did nothing more but to confess that the original Plaintiffs were in fact employees of the Defendant, Board of Education, that six of the Plaintiffs were teachers, three were non-teacher employees, five of the nine Plaintiffs were members of collective bargaining organizations, two of the nine Plaintiffs were black, and seven were white.

None of these allegations attack the sufficiency of Plaintiffs' original Petition, and in fact, Plaintiffs admitted that they were both certificated and non-certificated employees. The fact that some were members of collective bargaining organizations was immaterial to the allegations in the Petition, and yet the district court, affirmed by the Court of Appeals, held that this was a significant item.

The Defendants requested the District Court to take judicial cognizance of the existence of a Consent Decree in a separate case then pending before the Court, to-wit: *Liddell, et al. v. Board of Education of the City of St. Louis, et al.,* bearing Federal District Court Cause Number 72-C-100(1). The Defendants claimed that they had a defense to Plaintiffs' Petition in that they were merely complying with a purported Consent Decree entered on December 24, 1975. If such was the honest allegation of Defendants, then it might have constituted a defense. Yet, in a Motion to Dismiss, defenses cannot be considered. 5 Wright & Miller, Federal Practice and Procedure, Section 1356, page 592. It is only under circumstances when:

> "The complaint . . . is subject to dismissal under Rule 12(b)(6) when its allegations indicate the existence of an affirmative defense, but the defense must clearly appear on the face of the pleadings." 5 Wright & Miller, Federal Practice and Procedure, Section 1357, pages 605-606.

There can be no question but that the District Court, affirmed by the Court of Appeals, treated the motion pending before it as a Motion to Dismiss.

"It is further ordered that Defendants' Motion to Dismiss be and is granted. Plaintiff's complaint is hereby dismissed with prejudice." Page 4 of District Court memorandum opinion; appendix page A-46.

"The Court will next address the Defendants' Motion to Dismiss for Failure to State a Claim under Rule 12(b)(6) F.R.C.P." Appendix page A-50.

Concededly, the District Court could have, under certain circumstances, treated the Motion to Dismiss as a Motion for Summary Judgment under the provisions of Rule 56 F.R.C.P. as the Eighth Circuit said in *Evans v. McDonnell Douglas Aircraft Corporation*, 395 F.2d 359 (8 C.A., 1968). The Eighth Circuit Court of Appeals held that under certain circumstances, a district court may treat a motion to dismiss under Rule 12(b)(6) as a motion for summary judgment under Rule 56. The District Court did not purport to treat the Motion to Dismiss as a motion for summary judgment, and thus, obviously went beyond its authority and power.

However, even if the Court had treated the Motion to Dismiss as a motion for summary judgment, then it still erroneously applied the improper criteria.

"Considering the motion therefor as one for summary judgment, the crucial question is whether this case presents a genuine issue as to some material fact. Unless the pleadings and supporting documents disclose beyond any doubt the absence of a genuine issue of fact, summary judgment should not be entered. *Evans v. McDonnell Douglas Aircraft Corporation*, supra, at page 362.

Yet the District Court, whose decision was affirmed per curiam by the Court of Appeals, stated:

"There is, therefore, virtually no probability of success on the merits of an equal protection claim where the Board has such authority to transfer teachers." (District Court's Opinion, Appendix page A-50)

Thus the District Court applied the improper criteria and dismissed the cause of action for failure to state a claim because in its opinion there was virtually no probability of success on the merits.

In addition to taking judicial cognizance of the Consent Decree in Case Number 72-C-100(1), the District Court also presumed, assumed, and somehow or other magically took judicial cognizance that each of the transfers of which Plaintiffs complain were somehow or other required by the Consent Decree. The Plaintiffs' Petition alleged that the Defendant intended to transfer, assign, or reassign approximately 648 employees based exclusively on their race. The District Court magically concluded that all 648 employee transfers were required to "affirmatively act to reduce the racial imbalance of teachers in the St. Louis City School System." Appendix page A-50.

It is wanton injustice for this Court to allow such wholesale presumptions to go unfettered. Even if the Defendants honestly believed they had a legitimate defense to Plaintiffs' Petition under the terms of the Consent Decree, they were required to plead that defense initially. At some point it was encumbent upon them to prove that 648 employee transfers were required to meet the terms of the consent decree. They chose not to, and the District Court and the Eighth Circuit Court of Appeals allowed themselves to be accomplices to this blatant and baseless assignment and transfer policy.

F

The Judges of the Court of Appeals Erred in Determining That the District Court Could Judicially Note That the Numerical Extent of Employee Assignments and Transfers Were Necessary to Comply With the Purported Consent Decree Without the Hearing of Any Evidence.

As was mentioned above, the Court of Appeals, in its per curiam opinion, affirmed the District Court opinion for the reasons stated in the District Court opinion. The basis for the District Court's opinion was that:

> "Paragraph five of that consent order, which was approved by this Court, requires the Defendants to affirmatively act to reduce the racial imbalance of teachers in the St. Louis School System.
>
> "The Court is of the opinion that the teachers can state no claim, federal or otherwise, for the transfers ordered under the Consent Decree in *Liddell*, supra." Appendix page A-50.

Quite obviously the District Court, without any supporting documents or evidence, and without even an affirmative defense having been pleaded, concluded that the 648 transfers were somehow or other magically required by the Consent Decree. Such gross presumption is so foreign to any basis in fact, that this Court ought not allow it to stand unchallenged.

G

The Judges of the Court of Appeals Erred in Determining That Plaintiffs' Cause of Action Can Be Barred by Laches Prior to the Expiration of the Statute of Limitation, in the Absence of Any Showing That Defendant Were Either Damaged by or Relied Upon Plaintiffs' Inactivity.

The District Court and the Court of Appeals pointed out that the Plaintiffs were given an opportunity to intervene in *Liddell*,

but chose not to do so. The court then used this observation to support its "determination that Plaintiffs can state no claim."

Whether this philosophy be described as laches or estoppel, the Court improperly considered the doctrine. Both laches and estoppel are affirmative defenses which need to be affirmatively pled and may not be considered on motions to dismiss.

> "Rule 8(C) of the Rules of Civil Procedure requires that . . . estoppel and any other matter constituting an avoidance or affirmative defense must be set forth affirmatively. If this is to be an issue, Defendant must answer the complaint before it can be heard on it." *Cohen v. United States*, 129 F.2d 733, 737 (8 C.A., 1942).

The mere lapse of time without anything rendering it inequitable to grant relief does not constitute laches. *Spiller v. St. Louis and San Francisco Railway Company*, 14 F.2d 284 (8 C.A., 1926); *Nave-McCord Mercantile Company v. Raney*, 29 F.2d 383 (8 C.A., 1926). Mere delay in filing suit does not constitute laches, since it must be shown that the party pleading laches was in some way prejudiced by the delay. Similarly for employment discrimination, the statute of limitations in Missouri is five years. 516.120 R.S.Mo. (1969); *Green v. McDonnell Douglas Corporation*, 463 F.2d 337 (8 C.A., 1972). Yet the District Court, affirmed by the Court of Appeals held that the fact that the Plaintiffs, who filed their cause of action within less than one year of the applicable statute of limitations, had somehow become estopped, and that this somehow magically supported the determination that the Plaintiffs can state no claim.

It is appropriate for this Court to grant certiorari to rule on this issue and to instruct the Federal Court as to the distinction of the use of both estoppel, laches, and its concomitant relationship to the Statute of Limitations.

H

The Judges of the Court of Appeals Erred in Determining That an Employer May Use Race as the Sole Criteria for Assigning or Transferring Its Employees in the Absence of Any Acknowledgment or Finding of Prior Racial Discrimination by the Employer.

In recent terms of court, this Court has ruled in *Regents of the University of California v. Bakke*, — U.S. —, 57 L.Ed.2d 756, 1978, that in the absence of prior unlawful employment discrimination, explicit racial classifications have never before been countenanced by the Court.

> "The employment discrimination cases also do not advance Petitioner's cause. For example in *Franks v. Bowman Transportation Company*, 424 U.S. 747, 1975, we approved a retroactive award of seniority to a class of negro bus drivers who had been the victims of discrimination—not just by society at large, but by the respondent in that case. While this relief imposed some burdens on other employees, it was held necessary to make (the victims) whole for injuries suffered on account of unlawful employment discrimination." *Regents of The University of California v. Bakke*, 57 L.Ed.2d at 778 (1978).
>
> "But we have never approved preferential classification in the absence of proven constitutional or statutory violations." Ibid. at 778-779.
>
> "Without such finding of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm." Ibid. at 782-783.

The majority of the judges agreed that:

> "It is evident that the Davis Special Admissions Program involves the use of an explicit racial classification never before countenanced by this Court." *Regents of the University of California*, ibid. at page 789.

The Court of Appeals did not find, and the District Court in its opinion does not suggest, that there has been a finding of de jure segregation in the St. Louis Public Schools necessary to assign its employees on a racially discriminatory basis. The Court of Appeals, in considering the Consent Decree in 1976 held that:

> "The parties were faced with an admittedly de jure segregated school system whose district lines have been coterminous with those of the City since 1876." *Liddell, et al. v. Caldwell, et al.*, 546 F.2d 768, 772 (8 C.A., 1976).

However, the Court of Appeals also took it upon itself to comment that the Consent Decree "will encounter serious constitutional objection." *Liddell, et al. v. Caldwell, et al.*, ibid. at page 773. It is important to note that the conclusion of the Court of Appeals was totally in error in concluding that the school system in St. Louis was "an admittedly de jure school system." The evidence of that erroneous conclusion is that the trial of that issue concluded in the Eastern District of Missouri with final arguments on February 2, 1979 with no final decision.

Therefore, there is at least a serious question as to whether or not the Consent Decree constitutes a final judgment, and in the absence of a finding of prior racial discrimination, Petitioners urge that this Court rule that race may not be used as the sole criteria for assigning or transferring employees.

I

The Judges of the Court of Appeals Erred in Determining That a Federal District Court May Judicially Approve a Consent Decree Requiring the Assignment and Transfer of Employees Based Solely on Their Race in the Absence of a Judicial Determination or Admission That the Assignment and Transfer Are Required to Overcome Prior Discriminatory Conduct on the Part of the Employer.

The corollary question to whether race may be used as the sole criteria for assigning employees in the absence of a finding of racial discrimination is the power of a Federal Court to approve a consent decree requiring an assignment or transfer of employees using race as the sole criteria in the absence of such a judicial finding. It is appropriate, at this stage of this Court's review of the cases, that the Court definitively state that in the absence of a judicial finding of prior discriminatory conduct, the Federal Courts have no jruisdiction, and may not approve or in any way be parties to an agreement between litigating parties to discriminate or classify its employees on a racial basis.

CONCLUSION

For all of these reasons, it is respectfully urged upon this Court that the Writ of Certiorari be granted and that the Court take jurisdiction to hear the appeal.

Respectfully submitted,

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APPENDIX

APPENDIX 1

State of Missouri }
City of St. Louis } ss.

In the Circuit Court of the City of St. Louis
State of Missouri
Cause No. 782-4280
Equity Division No. 3

Charles Murphy, Reba Viscuso, Ellen Bordero, Rosalind Steel, Betty Turley, Virgil Kolodgie, Florence Claridge, Marvin Crader, and Virginia Norris,
Plaintiffs,
vs.
The Board of Education of the City of St. Louis, a Public Corporation, Serve: Mr. Robert E. Wentz, Superintendent of Schools, 911 Locust Street, St. Louis, Missouri,
and
Gordon L. Benson, Anita L. Bond, Frederick E. Busse, Henry M. Grich, Betty Klinefelter, Lawrence Moser, Lawrence E. Nicholson, Daniel L. Schlafly, Marjorie Smith, Dorothy C. Springer, Marjorie M. Weir, and Donald W. Williams, Constituting and Being Members of the Board of Education of the City of St. Louis, Serve at: 911 Locust Street, St. Louis, Missouri,
and
Robert E. Wentz, Superintendent of Schools, 911 Locust Street, St. Louis, Missouri,
and
Burchard Neel, Jr., Associate Superintendent of Schools, 911 Locust Street, St. Louis, Missouri,
Defendants.

PETITION

Come now Plaintiffs and for their causes of action state as follows:

Count I

1. Defendant, the Board of Education of the City of St. Louis, hereinafter referred to as "the Board," is a public corporation, duly organized and existing under and by virtue of the laws of the State of Missouri, and whose chief administrative officer is Robert E. Wentz, Superintendent of Schools.

2. Defendants, Benson, Bond, Busse, Grich, Klinefelter, Moser, Nicholson, Schlafly, Smith, Springer, Weir, and Williams, hereinafter referred to as "Board members," are members of and constitute the Board of Education of the City of St. Louis.

3. Defendant, Wentz, is the Superintendent of Schools, charged with the responsibility of the general administration and supervision of school activities within the City of St. Louis.

4. Defendant, Neel is an Associate Superintendent of Schools and is charged with the responsibility and general administration and supervision of personnel matters for the Board.

5. Plaintiffs are, and at all material times herein mentioned were, employees of the Board.

6. That jurisdiction of this cause is vested in this Court by reason of 527.010 through 527.130 R.S.Mo. (1969).

7. That the Board has classified all of its employees into two categories: certificated and noncertificated employees, in accord with Chapter 168 of the Revised Statutes of Missouri.

8. That the certificated employees are those employees in a general teaching capacity and possessing a certificate issued by the State of Missouri authorizing and empowering said employee to teach in public school systems within the State of Missouri.

9. That all other employees of the Board are noncertificated employees.

10. That employees, having obtained tenured status under the laws of the State of Missouri, may not be discharged, disciplined, or have their jobs and employment rights in any other way altered, except in accord with Board policy and in accord with Chapter 168 of the Revised Statutes of Missouri.

11. That the Board has established procedures wherein the rights of its employees are protected in the areas of assignment and transfer.

12. That amongst the criteria established by the Board in determining employee rights and the assignment or transfer of employees to other job locations are:

a) Tenured employees have the right to remain in their present position in preference to probationary employees.

b) Among employees of equal rank and system seniority, the employees with the greatest building seniority have the right to remain in their present position.

c) In making assignments and transfers of certified employees, consideration is to be given to grade level, subject matter area, position for which the teacher is best suited by qualification and experience, available existing vacancies, school and locality preference, residence of the employee, and transportation facilities.

13. That Section 296.020 R.S. Mo. (1969) provides in pertinent part:

"296.020. Unlawful employment practices defined.

"It shall be an unlawful employment practice:

"(1) For an employer, because of the race, creed, color, religion, national origin, sex, or ancestry of any individual:

"(a) To fail to refuse to hire or to discharge any individual, or otherwise to discriminate against any

individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, creed, color, religion, national origin, sex, or ancestry; or

"(b) To limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, creed, color, religion, national origin, sex, or ancestry;"

* * * * * * *

"(3) For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification, or discrimination, because of race, creed, color, religion, national origin, sex or ancestry, unless based upon a bona fide occupational qualification or for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against any individual because of his race, creed, color, religion, national origin, sex or ancestry, or to classify or refer for employment any individual on the basis of his race, creed, color, religion, national origin, sex or ancestry."

* * * * * * *

"(5) For any person, whether an employer or an employee, or not, to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this chapter, or to attempt to do so."

14. That Section One of the 14th Amendment of the United States Constitution provides:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

15. That 42 U. S. C. Section 1981 provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

16. That 42 U. S. C. Section 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

17. That 42 U. S. C. Section 2000e-2 provides:

"(a) It shall be an unlawful employment practice for an employer—

"(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any

individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

18. That Ordinance Number 51512 of the City of St. Louis, approved November 29, 1962 provides, in applicable part:

"SECTION TWO: It shall be an unlawful employment practice:

"(a) For an employer, because of race, creed, color, religion, national origin or ancestry of any individual to refuse to hire or employ or to bar or discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

* * * * * * * *

"(c) For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses directly or indirectly any limitation, specification, or discrimination because of race, creed, color, religion, national origin, or ancestry, unless based upon a bona fide occupational qualification."

19. That Ordinance Number 57173 of the City of St. Louis, approved April 2, 1976, provides in applicable part:

"Section Nine—Discriminatory practices—Discriminatory practices, as hereinafter defined and established, are hereby prohibited and declared unlawful:

"a) DISCRIMINATION IN EMPLOYMENT—It shall be unlawful employment practice:

"1) For an employer to fail or refuse to hire, to discharge, or otherwise to discriminate against any individual with respect to compensation or the terms, conditions, or privileges of employment, because of race, creed, color, age, religion, sex, national origin or ancestry.

* * * * * * * *

"4) For an employer, labor organization, or employment agency to print or circulate or cause to be printed or circulated any placement advertisement or publication or to make any inquiry in connection with prospective employment which expresses directly or indirectly any preference, limitation, specification, or discrimination because of race, creed, color, age, religion, sex, national origin, or ancestry, unless based upon a bona fide occupational qualification."

20. That the Board, Board members, Defendant, Wentz, and Defendant, Neel, are currently engaged in acts in violation of the aforesaid policy and procedures, Constitutional Amendment, Federal and State Statutes, and City Ordinances, in the following respects:

a) That they are assigning, reassigning, and transferring employees based on their race, color, ancestry, and national origin.

b) That they are assigning, reassigning, and transferring employees without regard to grade level, subject matter area, position for which the employee is best suited by qualification and experience, available existing vacancies, school and locality preferences, residence of the employee, and transportation facilities.

c) That they are discriminating against employees with respect to terms, conditions, or privileges of employment because of the employee's race, color, ancestry, and national origin in assigning, reassigning, and transferring employees.

d) That they are limiting, segregating, and classifying employees in a way which adversely deprives and tends to deprive employees of employment opportunities and adversely affects employee status by assigning, reassigning, and transferring employees based on their race, color, ancestry, and national origin.

e) That they are maintaining, using, printing, and circulating statements, advertisements, and publications which express limitations, specifications, and discrimination based on race, color, ancestry, and national origin in that black and white employees are being assigned, reassigned, and transferred to locations from separate lists based exclusively on the race, color, ancestry, and national origin of the employees.

f) That the defendants have predetermined which of its employees will be assigned, reassigned, and transferred based on the race, color, ancestry, and national origin of the employees and has and is inciting, compelling, and coercing employees to accept the discriminatory assignments, reassignments, and transfers.

21. That Plaintiffs have received a notification that they will be transferred, reassigned, or assigned based exclusively on their race.

22. That the Board currently intends to transfer, assign, or reassign approximately 648 employees prior to the opening of the 1978-79 school year, based exclusively on their race.

23. That Plaintiffs believe on their best information that the Board, Board members, Defendant, Wentz, and Defendant, Neel, have authorized, instructed, or caused several hundred other employees to be assigned, transferred, or reassigned, based exclusively on their race.

24. That Plaintiffs bring this suit on behalf of themselves and all employees of the Board; that the Board has in excess of seven thousand (7,000) employees; and that those persons who are affected by this decision are too numerous to be named individually, and that the Plaintiffs herein fairly and adequately represent the class of employees of the Board.

WHEREFORE, Plaintiffs pray an order of this Court:

(A) Designating them as representatives of the class of employees of the Board affected by Board policies and actions as above described;

(B) Adjudging that the actions, policies, and practices of the Board, Board members, and Defendants, Wentz and Neel, of assigning, transferring, or reassigning employees based on their race, are illegal, invalid, and unconstitutional, and contrary to the laws of the State of Missouri, the United States, and the City of St. Louis;

(C) Awarding them attorney's fees and the reimbursement of all costs expended in this cause; and

(D) For such other orders as to this Honorable Court shall seem meet and just.

Count II

1. Plaintiffs reallege each and every allegation contained in Paragraphs 1 through 24 of Count I.

2. That unless restrained or enjoined by this Court, Defendants, Board, Board members, Wentz, and Neel, will continue to unlawfully and illegally discriminate against employees and will order and carry out their discriminatory practices of assignment, reassignment, and transfers.

3. That the Plaintiffs and the class which Plaintiffs represent have no adequate remedy at law.

WHEREFORE, Plaintiffs pray an order of this Court;

(A) Ordering and directing the Defendants, Board, Board members, Wentz, and Neel, to show cause why they should not be restrained from assigning, transferring, or reassigning employees based on their race;

(B) For a preliminary injunction;

(C) Upon a full hearing on the merits, for a permanent injunction prohibiting, restraining, and enjoining Defendants, and each of them, from assigning, reassigning, or transferring, or attempting to assign, reassign, or transfer employees based on their race;

(D) That the Court further award the Plaintiffs' attorney's fees and all costs expended in this cause; and

(E) For such other relief as to this Court might seem meet and just.

Count III

1. Plaintiffs reallege each and every allegation contained in Paragraphs 1 through 24 of Count I and Paragraphs 1 through 3 of Count II.

2. That the Defendants, Board, Board members, Wentz, and Neel, have, by their actions and attempted actions, damaged the Plaintiffs and all members of the class which they represent and against whom the Defendants have already discriminated by assigning, reassigning, or transferring, in the amount of Ten Million and No/100 Dollars ($10,000,000.00).

WHEREFORE, Plaintiffs, on behalf of themselves and all members of the class which they represent, pray judgment against the Defendants, and each of them:

(A) In the amount of Ten Million and No/100 Dollars ($10,000,000.00);

(B) For attorney's fees;

(C) For their costs expended in this cause; and

(D) For such other relief as might be just.

/s/ CHARLES R. MURPHY
CHARLES R. MURPHY

/s/ REBA VISCUSO
REBA VISCUSO

/s/ ELLEN BORDERO
ELLEN BORDERO

/s/ ROSALIND STEEL
ROSALIND STEEL

/s/ BETTY TURLEY
BETTY TURLEY

/s/ VIRGIL KOLODGIE
VIRGIL KOLODGIE

/s/ FLORENCE CLARIDGE
FLORENCE CLARIDGE

/s/ MARVIN CRADER
MARVIN CRADER

/s/ VIRGINIA NORRIS
VIRGINIA NORRIS

Subscribed and sworn to before me this 9th day of June, 1978.

/s/ ANTHONY J. SESTRIC
ANTHONY J. SESTRIC
Notary Public

My Commission Expires: August 26, 1980

FORDYCE & MAYNE
/s/ By ANTHONY J. SESTRIC
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(314) 863-6900
Attorneys for Plaintiffs

APPENDIX 2

City of St. Louis }
State of Missouri } ss.

In the Circuit Court of the City of St. Louis
State of Missouri

Cause No. 782-4280

Equity Division No. 3

Charles Murphy, Reba Viscuso, Ellen Bordero, Rosalind Steel, Bettey Turley, Virgil Kolodgie, Florence Claridge, Marvin Crader, and Virginia Norris, Plaintiffs,

vs.

The Board of Education of The City of St. Louis, a Public Corporation, Serve: Mr. Robert E. Wentz, Superintendent of Schools, 911 Locust Street, St. Louis, Missouri,

and

Gordon L. Benson, Anita L. Bond, Frederick E. Busse, Henry M. Grich, Betty Klinefelter, Lawrence Moser, Lawrence E. Nicholson, Daniel L. Schlafly, Marjorie Smith, Dorothy C. Springer, Marjorie M. Weir, and Donald W. Williams, constituting and being members of the Board of Education of the City of St. Louis, Serve at: 911 Locust Street, St. Louis, Missouri,

and

Robert E. Wentz, Superintendent of Schools, 911 Locust Street, St. Louis, Missouri,

and

Burchard Neel, Jr., Associate Superintendent of Schools, 911 Locust Street, St. Louis, Missouri, Defendants.

ORDER TO SHOW CAUSE

On reading and filing the Petition in this cause and on Motion of Plaintiffs,

IT IS ORDERED that the above-named Defendants, Board of Education of the City of St. Louis, Gordon L. Benson, Anita L. Bond, Frederick E. Busse, Henry M. Grich, Betty Klinefelter, Lawrence Moser, Lawrence E. Nicholson, Daniel L. Schlafly, Marjorie Smith, Dorothy C. Springer, Marjorie M. Weir, Donald W. Williams, Robert E. Wentz, and Burchard Neel, Jr., show cause before this Court on the 29th day of June, 1978 at 9:30 a.m. or as soon thereafter as counsel can be heard in Division 3 for the Circuit Court of the City of St. Louis, at the Courthouse in the City of St. Louis, State of Missouri, why a preliminary injunction should not issue during the pendency of said action, according to the prayer of such Petition; and

It appearing to the Court's satisfaction that a proper case is presented for the issuance of an order to show cause in the place and stead of the usual notice of motion, it is hereby ordered and directed that service of this order to show cause and of the papers on which the same has been granted on the Defendants on or before the 29th day of June, 1978 shall be held sufficient notice of motion herein and the application for a preliminary injunction herein.

IT IS FURTHER ORDERED that the Clerk of this Court be hereby directed to cause certified copies of this order to be made, and that a copy of the Petition and a copy of this order be served on the above-named Defendants.

. . . . . .

Presiding Judge—Division No. . .

Dated this 12th day of June, 1978.

APPENDIX 3

In the United States District Court
Eastern District of Missouri
Eastern Division

Cause No. . . . . .

The Board of Education of the City of St. Louis,

and

Gordon L. Benson, Anita L. Bond, Frederick E. Busse, Henry M. Grich, Betty Klinefelter, Lawrence Moser, Lawrence E. Nicholson, Daniel L. Schlafly, Marjorie Smith, Dorothy C. Springer, Marjorie M. Weir, and Donald W. Williams, constituting and being members of the Board of Education of the City of St. Louis,

and

Robert E. Wentz, Superintendent of Schools,

and

Burchard Neel, Jr., Associate Superintendent of Schools,

Petitioners,

vs.

Charles Murphy, Reba Viscuso, Ellen Bordero, Rosalind Steel, Betty Turley, Virgil Kolodgie, Florence Claridge, Marvin Crader, and Virgina Norris,

Respondents.

PETITION FOR REMOVAL

(Filed June 23, 1978)

The Board of Education of the City of St. Louis and the other named petitioners herein (hereinafter referred to as petitioners) show as follows:

1. This is an action commenced against petitioners on June 12, 1978 in the Circuit Court of the City of St. Louis, State of Missouri, being Cause No. 782-4280 and styled Charles Murphy, Reba Viscuso, Ellen Bordero, Rosalind Steel, Betty Turley, Virgil Kolodgie, Florence Claridge, Marvin Crader, and Virginia Norris, Plaintiffs, vs. The Board of Education of the City of St. Louis, and Gordon L. Benson, Anita L. Bond, Frederick E. Busse, Henry M. Grich, Betty Klinefelter, Lawrence Moser, Lawrence N. Nicholson, Daniel L. Schlafly, Marjorie Smith, Dorothy C. Springer, Marjorie M. Weir, and Donald W. Williams, constituting and being members of the Board of Education of the City of St. Louis, and Robert E. Wentz, Superintendent of Schools and Burchard Neel, Jr., Associate Superintendent of Schools, Defendants, wherein plaintiffs (respondents here) pray for damages in the sum of $10,000,000.00; for a permanent injunction, attorney's fees and costs. On the same day, an Order to Show Cause with a notice of hearing scheduled for June 29, 1978, was issued.

2. The matter in controversy in this action, exclusive of interest and costs, exceeds the sum of $10,000.00 and this action is wholly of a civil nature.

3. The above described action is a civil action of which this Court has original jurisdiction under the provisions of Title 28,

United States Code, Section 1331, and is one which may be removed to this Court by these petitioners (defendants therein), pursuant to the provisions of Title 28, United States Code, Section 1441, in that according to plaintiffs' petition their action arises under the Fourteenth Amendment to the Constitution of the United States, Sec. 1, and 42 USC 1981, 1983 and 2000e-2. Plaintiff's action amounts to an attack against the Consent Judgment and Decree entered by this Court on December 24, 1975 in cause No. 72C 100(1) styled *Liddell, et al. v. Board of Education of the City of St. Louis, et al.*

4. The summons issued out of the Circuit Court of the City of St. Louis was served upon these petitioners on the 20th day of June, 1978.

None of your petitioners has appeared in the Circuit Court of the City of St. Louis and the time within which your petitioners are required by law in the State of Missouri to plead or answer in this cause has not yet expired. Attached hereto and marked Exhibit 1 is a copy of the Summons issued by the Circuit Court of the City of St. Louis, State of Missouri, which was served together with a copy of plaintiffs' original petition, which is attached hereto as Exhibit 2, and the Show Cause Order which is attached hereto as Exhibit 3. No further proceedings have been had therein.

5. Petitioners file herewith a bond with good and sufficient surety, conditioned, as provided in Title 28 U.S.C., Section 1446(d), that the petitioners will pay all costs and disbursements incurred by reason of the removal proceedings hereby brought, should it be determined that the cause was not removable or was improperly removed.

WHEREFORE, your petitioners pray that this Court accept

this petition and the bond presented herewith and that it assume jurisdiction of this action.

LASHLY, CARUTHERS, THIES, RAVA &
HAMEL, A Professional Corporation
/s/ JOHN H. LASHLY
PAUL B. RAVA
Attorneys for Petitioners
818 Olive Street, Suite 1300
St. Louis, Missouri 63101
621-2939

State of Missouri }
City of St. Louis } ss.

Paul B. Rava, being duly sworn on his oath, says that he is one of the attorneys for petitioners herein; that he is authorized to and does make this affidavit on behalf of said petitioners and that he has read the above and foregoing petition and that the facts stated therein are true and correct to the best of his knowledge, information and belief.

/s/ PAUL B. RAVA

Subscribed and sworn to before me this 22nd day of June, 1978.

/s/ MARY C. HUSSMAN
Notary Public

My Commission Expires: 6/30/80

EXHIBIT 1

Circuit Court of the City of St. Louis
State of Missouri

Charles Murphy et al.,
Plaintiff,
vs.
The Board of Education of the City of St. Louis, et al.,
Defendant.
No. 782-4280
Div. 3

Summons

The State of Missouri to Defendant The Board of Education of the City of St. Louis, Gordon L. Benson, Anita L. Bond, Frederick E. Busse, Henry M. Grich, Betty Klinefelter, Lawrence Moser, Lawrence E. Nicholson, Daniel L. Schlafly, Marjorie Smith, Dorothy C. Springer, Marjorie M. Weir, and Donald Williams and Robert E. Wentz and Buchard Neel, Jr.

You are hereby summoned to appear before the above-named court and to file your pleading to the petition, copy of which is attached hereto, and to serve a copy of your pleading upon Fordyce & Mayne, attorney for plaintiff, whose address is 120 S. Central, Clayton, Missouri 63105, all within 30 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the petition.
Dated June 15th, 1978

JOSEPH P. RODDY
Circuit Clerk
By (Illegible)
Deputy Clerk

[Seal of Circuit Court]

EXHIBIT 2

State of Missouri }
City of St. Louis } ss.

In the Circuit Court of the City of St. Louis
State of Missouri

Cause No. 782-4280
Equity Division No. 3

Charles Murphy, Reba Viscuso, Ellen Bordero, Rosalind Steel, Betty Turley, Virgil Kolodgie, Florence Claridge, Marvin Crader, and Virginia Norris, Plaintiffs,

vs.

The Board of Education of The City of St. Louis, a Public Corporation, Serve: Mr. Robert E. Wentz, Superintendent of Schools, 911 Locust Street, St. Louis, Missouri,

and

Gordon L. Benson, Anita L. Bond, Frederick E. Busse, Henry M. Grich, Betty Klinefelter, Lawrence Moser, Lawrence E. Nicholson, Daniel L. Schlafly, Marjorie Smith, Dorothy C. Springer, Marjorie M. Weir, and Donald W. Williams, constituting and being members of the Board of Education of the City of St. Louis, Serve at: 911 Locust Street, St. Louis, Missouri,

and

Robert E. Wentz, Superintendent of Schools, 911 Locust Street, St. Louis, Missouri,

and

Burchard Neel, Jr., Associate Superintendent of Schools, 911 Locust Street, St. Louis, Missouri, Defendants.

PETITION

Come now Plaintiffs and for their causes of action state as follows:

Count I

1. Defendant, the Board of Education of the City of St. Louis, hereinafter referred to as "the Board," is a public corporation, duly organized and existing under and by virtue of the laws of the State of Missouri, and whose chief administrative officer is Robert E. Wentz, Superintendent of Schools.

2. Defendants, Benson, Bond, Busse, Grich, Klinefelter, Moser, Nicholson, Schlafly, Smith, Springer, Weir, and Williams, hereinafter referred to as "Board members," are members of and constitute the Board of Education of the City of St. Louis.

3. Defendant, Wentz, is the Superintendent of Schools, charged with the responsibility of the general administration and supervision of school activities within the City of St. Louis.

4. Defendant, Neal, is an Associate Superintendent of Schools and is charged with the responsibility and general administration and supervision of personnel matters for the Board.

5. Plaintiffs are, and at all material times herein mentioned were, employees of the Board.

6. That jurisdiction of this cause is vested in this Court by reason of 527.010 through 527.130 R.S.Mo. (1969).

7. That the Board has classified all of its employees into two categories: certificated and noncertificated employees, in accord with Chapter 168 of the Revised Statutes of Missouri.

8. That the certificated employees are those employees in a general teaching capacity and possessing a certificate issued by the State of Missouri authorizing and empowering said employee to teach in public school systems within the State of Missouri.

9. That all other employees of the Board are noncertificated employees.

10. That employees, having obtained tenured status under the laws of the State of Missouri, may not be discharged, disciplined, or have their jobs and employment rights in any other way altered, except in accord with Board policy and in accord with Chapter 168 of the Revised Statutes of Missouri.

11. That the Board has established procedures wherein the rights of its employees are protected in the areas of assignment and transfer.

12. That amongst the criteria established by the Board in determining employee rights and the assignment or transfer of employees to other job locations are:

a) Tenured employees have the right to remain in their present position in preference to probationary employees.

b) Among employees of equal rank and system seniority, the employees with the greatest building seniority have the right to remain in their present position.

c) In making assignments and transfers of certified employees, consideration is to be given to grade level, subject matter area, position for which the teacher is best suited by qualification and experience, available existing vacancies, school and locality preference, residence of the employee, and transportation facilities.

13. That Section 296.020 R.S.Mo. (1969) provides in pertinent part:

"296.020. Unlawful employment practices defined.

"It shall be an unlawful employment practice:

"(1) For an employer, because of the race, creed, color, religion, national origin, sex, or ancestry of any individual:

"(a) To fail to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, creed, color, religion, national origin, sex, or ancestry; or

"(b) To limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, creed, color, religion, national origin, sex, or ancestry;"

* * * * * * *

"(3) For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification, or discrimination, because of race, creed, color, religion, national origin, sex or ancestry, unless based upon a bona fide occupational qualification or for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against any individual because of his race, creed, color, religion, national origin, sex or ancestry, or to classify or refer for employment any individual on the basis of his race, creed, color, religion, national origin, sex, or ancestry."

* * * * * * *

"(5) For any person, whether an employer or an employee, or not, to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this chapter, or to attempt to do so."

14. That Section One of the 14th Amendment of the United States Constitution provides:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

15. That 42 U. S. C. Section 1981 provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

16. That 42 U. S. C. Section 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

17. That 42 U. S. C. Section 2000e-2 provides:

"(a) It shall be an unlawful employment practice for an employer—

"(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

18. That Ordinance Number 51512 of the City of St. Louis, approved November 29, 1962 provides, in applicable part:

"SECTION TWO: It shall be an unlawful employment practice:

"(a) For an employer, because of race, creed, color, religion, national origin or ancestry of any individual to refuse to hire or employ or to bar or discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

* * * * * * *

"(c) For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication or to use any form of application for employment or to make any inquiry in connection with prospective employ-

ment, which expresses directly or indirectly any limitation, specification, or discrimination because of race, creed, color, religion, national origin, or ancestry, unless based upon a bona fide occupational qualification."

19. That Ordinance Number 57173 of the City of St. Louis, approved April 2, 1976, provides in applicable part:

"Section Nine. Discriminatory practices—Discriminatory practices, as hereinafter defined and established, are hereby prohibited and declared unlawful:

"a) DISCRIMINATION IN EMPLOYMENT—It shall be unlawful employment practice:

"1) For an employer to fail or refuse to hire, to discharge, or otherwise to discriminate against any individual with respect to compensation or the terms, conditions, or privileges of employment, because of race, creed, color, age, religion, sex, national origin or ancestry.

* * * * * * *

"4) For an employer, labor organization, or employment agency to print or circulate or cause to be printed or circulated any placement advertisement or publication or to make any inquiry in connection with prospective employment which expresses directly or indirectly any preference, limitation, specification, or discrimination because of race, creed, color, age, religion, sex, national origin, or ancestry, unless based upon a bonafide occupational qualification."

20. That the Board, Board members, Defendant, Wentz, and Defendant, Neel, are currently engaged in acts in violation of

the aforesaid policy and procedures, Constitutional Amendment, Federal and State Statutes, and City Ordinances, in the following respects:

a) That they are assigning, reassigning, and transferring employees based on their race, color, ancestry, and national origin.

b) That they are assigning, reassigning, and transferring employees without regard to grade level, subject matter area, position for which the employee is best suited by qualification and experience, available existing vacancies, school and locality preferences, residence of the employee, and transportation facilities.

c) That they are discriminating against employees with respect to terms, conditions, or privileges of employment because of the employee's race, color, ancestry, and national origin in assigning, reassigning, and transferring employees.

d) That they are limiting, segregating, and classifying employees in a way which adversely deprives and tends to deprive employees of employment opportunities and adversely affects employee status by assigning, reassigning, and transferring employees based on their race, color, ancestry, and national origin.

e) That they are maintaining, using, printing, and circulating statements, advertisements, and publications which express limitations, specifications, and discrimination based on race, color, ancestry, and national origin in that black and white employees are being assigned, reassigned, and transferred to locations from separate lists based exclusively on the race, color, ancestry, and national origin of the employees.

f) That the Defendants have predetermined which of its employees will be assigned, reassigned, and transferred

based on the race, color, ancestry, and national origin of the employees and has and is inciting, compelling, and coercing employees to accept the discriminatory assignments, reassignments, and transfers.

21. That Plaintiffs have received a notification that they will be transferred, reassigned, or assigned based exclusively on their race.

22. That the Board currently intends to transfer, assign, or reassign approximately 648 employees prior to the opening of the 1978-79 school year, based exclusively on their race.

23. That Plaintiffs believe on their best information that the Board, Board members, Defendant, Wentz, and Defendant Neel, have authorized, instructed, or caused several hundred other employees to be assigned, transferred, or reassigned, based exclusively on their race.

24. That Plaintiffs bring this suit on behalf of themselves and all employees of the Board; that the Board has in excess of seven thousand (7,000) employees; and that those persons who are affected by this decision are too numerous to be named individually, and that the Plaintiffs herein fairly and adequately represent the class of employees of the Board.

WHEREFORE, Plaintiffs pray an order of this Court:

(A) Designating them as representatives of the class of employees of the Board affected by Board policies and actions as above described;

(B) Adjudging that the actions, policies, and practices of the Board, Board members, and Defendants, Wentz and Neel, of assigning, transferring, or reassigning employees based on their race, are illegal, invalid, and unconstitutional, and contrary to the laws of the State of Missouri, the United States, and the City of St. Louis;

(C) Awarding them attorney's fees and the reimbursement of all costs expended in this cause; and

(D) For such other orders as to this Honorable Court shall seem meet and just.

Count II

1. Plaintiffs reallege each and every allegation contained in Paragraphs 1 through 24 of Count I.

2. That unless restrained or enjoined by this Court, Defendants, Board, Board members, Wentz and Neel, will continue to unlawfully and illegally discriminate against employees and will order and carry out their discriminatory practices of assignment, reassignment, and transfers.

3. That the Plaintiffs and the class which Plaintiffs represent have an adequate remedy at law.

WHEREFORE, Plaintiffs pray an order of this Court;

(A) Ordering and directing the Defendants, Board, Board members, Wentz, and Neel, to show cause why they should not be restrained from assigning, transferring, or reassigning employees based on their race;

(B) For a preliminary injunction;

(C) Upon a full hearing on the merits, for a permanent injunction prohibiting, restraining, and enjoining Defendants, and each of them, from assigning, reassigning, or transferring, or attempting to assign, reassign, or transfer employees based on their race;

(D) That the Court further award the Plaintiffs attorney's fees and all costs expended in this cause; and

(E) For such other relief as to this Court might seem meet and just.

Count III

1. Plaintiffs reallege each and every allegation contained in Paragraphs 1 through 24 of Count I and Paragraphs 1 through 3 of Count II.

2. That the Defendants, Board, Board members, Wentz, and Neel, have by their actions and attempted actions, damaged the Plaintiffs and all members of the class which they represent. And against whom the Defendants have already discriminated by assigning, reassigning, or transferring, in the amount of Ten Million and No/100 Dollars ($10,000,000.00).

WHEREFORE, Plaintiffs, on behalf of themselves and all members of the class which they represent, pray judgment against the Defendants, and each of them:

(A) In the amount of Ten Million and No/100 Dollars ($10,000,000.00);

(B) For attorney's fees;

(C) For their costs expended in this cause; and

(D) For such other relief as might be just.

/s/ CHARLES R. MURPHY
/s/ REBA VISCUSO
/s/ ELLEN BORDERO
/s/ ROSALIND STEEL
/s/ BETTY TURLEY
/s/ VIRGIL KOLODGIE
/s/ FLORENCE CLARIDGE
/s/ MARVIN CRADER
/s/ VIRGINIA NORRIS

Subscribed and sworn to before me this 9th day of June, 1978.

/s/ ANTHONY J. SESTRIC
Notary Public

My Commission Expires: August 26, 1980

FORDYCE & MAYNE
By /s/ ANTHONY J. SESTRIC
120 South Central, Suite 1100
St. Louis, Missouri 63105
(314) 863-6900
Attorneys for Plaintiffs

EXHIBIT 3

State of Missouri }
City of St. Louis } ss.

In the Circuit Court of the City of St. Louis
State of Missouri

Cause No. 782-4280
Equity Division No. 3

Charles Murphy, Reba Viscuso, Ellen Bordero, Rosalind Steel, Betty Turley, Virgil Kolodgie, Florence Claridge, Marvin Crader, and Virginia Norris,

Plaintiffs,

vs.

The Board of Education of the City of St. Louis, a Public Corporation, Serve: Mr. Robert E. Wentz, Superintendent of Schools, 911 Locust Street, St. Louis, Missouri,

and

Gordon L. Benson, Anita L. Bond, Frederick E. Busse, Henry M. Grich, Betty Klinefelter, Lawrence Moser, Lawrence E. Nicholson, Daniel L. Schlafly, Marjorie Smith, Dorothy C. Springer, Marjorie M. Weir, and Donald W. Williams, Constituting and Being Members of the Board of Education of the City of St. Louis, Serve at: 911 Locust Street, St. Louis, Missouri,

and

Robert E. Wentz, Superintendent of Schools, 911 Locust Street, St. Louis, Missouri,

and

Burchard Neel, Jr., Associate Superintendent of Schools, 911 Locust Street, St. Louis, Missouri,

Defendants.

ORDER TO SHOW CAUSE

On reading and filing the Petition in this cause and on Motion of Plaintiffs,

IT IS ORDERED that the above-named Defendants, Board of Education of the City of St. Louis, Gordon L. Benson, Anita L. Bond, Frederick E. Busse, Henry M. Grich, Betty Klinefelter, Lawrence Moser, Lawrence E. Nicholson, Daniel L. Schlafly, Marjorie Smith, Dorothy C. Springer, Marjorie M. Weir, Donald W. Williams, Robert E. Wentz, and Burchard Neel, Jr., show cause before this Court on the 29th day of June, 1978 at 9:30 a.m. or as soon thereafter as counsel can be heard in Division 3 for the Circuit Court of the City of St. Louis, at the Courthouse in the City of St. Louis, State of Missouri, why a preliminary injunction should not issue during the pendency of said action, according to the prayer of such Petition; and

It appearing to the Court's satisfaction that a proper case is presented for the issuance of an order to show cause in the place and stead of the usual notice of motion, it is hereby ordered and directed that service of this order to show cause and of the papers on which the same has been granted on the Defendants on or before the 29th day of June, 1978, shall be held sufficient notice of motion herein and the application for a preliminary injunction herein.

It Is Further Ordered that the Clerk of this Court be hereby directed to cause certified copies of this order to be made, and that a copy of the Petition and a copy of this order be served on the above-named Defendants.

/s/ (Illegible)
Presiding Judge—Division No. 3

Dated this 12th day of June, 1978.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at office in the City of St. Louis, this 12th day of June, 1978.

JOSEPH P. RODDY
Circuit Clerk

/s/ By JULIAN BUCK
Deputy Clerk

(Seal)

APPENDIX 4

In the United States District Court for the
Eastern District of Missouri, Eastern Division

Charles Murphy, et al.,	Plaintiffs,	Cause No. 78-0628-C(1).
v.		
The Board of Education of The City of St. Louis, et al.,	Defendants.	

MOTION TO REMAND TO STATE COURT

Come now the Plaintiffs and move this Honorable Court for an order remanding this cause of action to the state court, and in support thereof state as follows:

1. Defendants herein, on the 23rd day of June, 1978, filed their Petition for Removal of this cause from the Circuit Court of the City of St. Louis, State of Missouri.

2. That in their Petition for Removal, Defendants stated that this cause arose under the Constitution, laws, or treaties of the United States.

3. That the Defendants alleged that this cause of action was removable to the Federal District Court under the provisions of 28 U.S.C. 1441.

4. That the Plaintiffs herein allege that this cause of action is *not* subject to the original jurisdiction of the Federal District Court under the provisions of 28 U.S.C. 1331.

5. That Plaintiffs further allege that there are *no* separate and independent claims or causes of action which are removable if sued upon alone.

6. That this cause was therefore improperly removed to the Federal District Court and should properly be remanded to the Circuit Court of the City of St. Louis for further proceeding.

WHEREFORE, Plaintiffs pay an order of this Honorable Court remanding this cause of action to the Circuit Court of the City of St. Louis for further proceedings and an order awarding Plaintiffs in this cause their costs incurred in this Court by reason of such removal.

FORDYCE & MAYNE
/s/ By ANTHONY J. SESTRIC
120 South Central, Suite 1100
St. Louis, Missouri 63105
(314) 863-6900
Attorneys for Plaintiffs

A copy of the above and foregoing Motion to Remand to State Court served upon Defendants, this 27th day of June, 1978 by depositing the same in the United States mail, postage prepaid, addressed to Mr. Paul B. Rava, Lashly, Caruthers, Thies, Rava & Hamel, Attorneys at Law, Paul Brown Building, 818 Olive Street, Suite 1300, St. Louis, Missouri 63101, Attorney of Record for Defendants.

/s/ ANTHONY J. SESTRIC

APPENDIX 5

United States District Court
Eastern District of Missouri

July 10, 1978

Charles Murphy, et al.
vs.
The Board of Education of The City of St. Louis, et al.
No. 78-06280C(1)

MEMORANDUM FOR CLERK

Defendants move to amend their petition for removal by interlineation and to insert the words "and Sections 1343(3) and (4)" in paragraph 3 of the said petition after the words "Section 1331" and by inserting the words "and Section 1443 (2)" in the same paragraph 3 after the words "Section 1441".

LASHLY, CARUTHERS, THIES, RAVA
& HAMEL, a Professional Corporation
By /s/ PAUL B. RAVA
Attorneys for Defendants
818 Olive Street, Suite 1300
St. Louis, Missouri 63101

cc: Mr. Anthony J. Sestric
Attorneys for Plaintiffs

.....
Plaintiff
Attorneys for
Defendant

APPENDIX 6

In the United States District Court
Eastern District of Missouri
Eastern Division

Charles Murphy, et al.,
Plaintiffs,
v.
The Board of Education of The City of St. Louis, et al.,
Defendants.
No. 78-0628-C(1)

MOTION OF DEFENDANTS THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, ET AL., TO DISMISS THIS ACTION FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED AND SUGGESTIONS IN SUPPORT

The Board of Education of the City of St. Louis, its members, the Superintendent and Associate Superintendent, all named herein as defendants, move this Honorable Court to dismiss the instant action for failure to state a claim upon which relief may be granted. As grounds for this Motion, defendants state:

The gravaman of plaintiffs' petition, filed in the Circuit Court of the City of St. Louis on June 12, 1978, is that defendants violated and are violating the Fourteenth Amendment to the Constitution of the United States and other civil rights legislation by reassigning teachers and other staff personnel on the basis of their race. The petition further avers that the reassignments contemplated to be effective at the beginning

of the 1978-79 school year will involve about 648 employees out of a total of over 7,000 employees.

The petition prays for a permanent injunction prohibiting the defendants from any and all such reassignments, and for $10,000,000.00 damages.

Plaintiffs are barred by laches and are estopped from making the claims asserted in their petition.

In substance, the petition is grounded on the alleged illegality of the actions taken by defendants in order to comply with the specific provisions of paragraph 5 of the Consent Judgment and Decree entered by this Court on December 24, 1975 in *Liddell, et al. v. Board of Education, et al.*, 72C 100(1). No reference to the Decree and other proceedings in the *Liddell* case is a glaring and meaningful omission in the petition of the plaintiffs.

Opportunity to intervene was given by the Court to any interested party in its Order of October 3, 1973, which was published in the St. Louis Daily Record for four weeks, beginning October 10, 1973 with notices to all television and radio stations. As this Court noted in its Order of June 21, 1974, no party [present plaintiffs included] requested intervention.

Contemporaneously with the entry of the Consent Judgment and Decree on December 24, 1975, this Court ordered the publication of a notice containing the text of the proposed Decree and giving to all interested parties [including the present plaintiffs] an opportunity to file objections and to be heard at a hearing scheduled for January 23, 1976. The record shows that some parties sought to intervene, and others filed objections, but the present plaintiffs did not do either. In particular, the St. Louis Teachers Union, Local 420, and the St. Louis Teachers Association and the Missouri State Teachers Association, St. Louis District, filed separate objections to the provisions of the Decree regarding the transfer of teachers.

In its Order of January 23, 1976 this Court denied all the objections. The Court also ordered that the School Board adopt a policy of transfer of personnel which was worked out in consultation with the Union and filed in Court on March 15, 1976. No appeal was taken by any of the teachers' groups or an individual teacher.

The present plaintiffs are barred by laches and the principle of orderly procedures from challenging the provisions of paragraph 5 of the Consent Judgment and Decree, two years and almost five months after the cut off date set by the Court, and after the conclusion of a thirteen week trial.

Furthermore by identifying themselves with, and as the representatives of, the 7,000 Board's employees, plaintiffs subsumed their position in that of the three teachers' organizations which filed written objections to the Consent Decree and were overruled by this Court on January 23, 1976. Representatives of the employees had their day in court; they should not be allowed to reopen that closed hearing by the expedient of expanding the area of relief requested to encompass a permanent injunction and $10,000,000.00 damages. The affidavit of Burchard Neel, Associate Superintendent in charge of personnel for the public school system, which is attached as Exhibit A to this Motion, shows that a majority of the plaintiffs herein were members either of the Union or of the Association during the period 1975-1976.

The device of moving the case from the federal court to the state court may be ingenuous but cannot defeat the orderly operation of our dual system of jurisdiction. Causes of action cannot be split either by the plaintiffs or by the defendants (compulsory counterclaim). Likewise interested parties must participate within the timetable set by the rules and the courts, and cannot await the outcome of the proceeding to assert be-

latedly what they failed to do within the required time. *Lockwood v. Hercules Powder Co.*, 7 FRD 24, 28 (W.D. Mo. 1947) shows that courts will not countenance a party to delay participating and "to gamble on the outcome" of the case.

Reassignments because of race factor in a desegregation program voluntarily undertaken by a Board of Education was held proper by the Supreme Court in *McDaniel v. Barresi*, 402 U.S. 39, which stated: "Any other approach would freeze the status quo that is the very target of all desegregation processes." (402 U.S. l.c. at p. 41)

While the *Barresi* case involved students, rather than employees, the rationale remains the same. In the recent decision of the Seventh Circuit in *Koltz, et al. v. Board of Education of the City of Chicago, et al.*, (decided June 1, 1978) (Slip Opinion attached as Exhibit B) the appellate court approved the holding below that the plaintiffs teachers were not entitled to injunctive relief from reassignment to different schools. The Seventh Circuit stated:

> "the plaintiffs had failed to establish deprivation of significant constitutional rights, that is, that there is no constitutional right to a teaching position in a particular location." (Slip Opinion l.c. p. 2)

The court also rejected plaintiffs' contention "that the Board's action violates the transferred teachers' rights to equal protection of the laws by singling out certain teachers for transfer" (Slip Opinion p. 3 ft. 2).

The Seventh Circuit pointed out that under Illinois law "the Board clearly has the authority to transfer teachers." To the same effect is the law of Missouri, Mo. R.S. Sec. 168.211.2. Hence the conclusion of the Seventh Circuit is clearly applicable here:

> "Absent a property interest and a legitimate claim of entitlement to the interest, the procedural safeguards of the Fourteenth Amendment simply do not apply. ***Board of Regents v. Roth,*** 408 U.S. 564, 576-78 (1972)." (Slip Opinion l.c. p. 3.)

In the present case, the contention rejected by the Seventh Circuit is further invalidated by the fact that the plaintiffs here include both black and white employees, as shown in Neel's affidavit (Exhibit B). Inconvenience because of transfers may be colorblind, but a charge of racial discrimination is inconsistent with, and cannot be targeted against, both races as the alleged victims.

Finally, it must be re-emphasized by these defendants that the transfers complained of are part of the Consent Judgment and Decree. As the Court is well aware, these defendants deny any unconstitutional conduct on their part. Nevertheless, in an attempt to settle the *Liddell* case and formulating a desegregation plan based upon the de facto segregation conditions existing in the City of St. Louis, defendants agreed to the Consent Judgment and Decree which includes a requirement to transfer personnel. As the Court of Appeals for the Eighth Circuit has indicated, this Consent Judgment and Decree is "obligatory on the respective parties." (Order denying stay of mandate in *Caldwell v. Board of Education,* 76-1228, filed January 28, 1977).

Plaintiffs' purported cause of action is not supported by case law. The Court in *Burns v. Board of School Commissioners of the City of Indianapolis, Indiana,* 302 F.Supp. 309, 312 (S.D. Indiana 1969), aff'd 437 F.2d 1143 (7th Cir. 1971), stated:

> "This particular exercise of legal sophistry has been advanced before, and found wanting. To the contrary, it has been held that the carrying out of the mandate of the Supreme Court in *Brown,* the states have necessarily and

> constitutionally based their desegregation plans on racial classification." (citations omitted)

For all of the reasons stated herein, it is respectfully submitted that defendants' Motion to Dismiss Plaintiffs' Petition for failure to state a claim for which relief may be granted should be sustained.

LASHLY, CARUTHERS, THIES, RAVA
& HAMEL, a Professional Corporation
By JOHN H. LASHLY
PAUL B. RAVA
KENNETH C. BROSTRON
Attorneys for Defendants
818 Olive Street, Suite 1300
St. Louis, Missouri 63101
(314) 621-2939

Certificate of Service

This is to certify that a copy of the foregoing was mailed this ..... day of July, 1978 to Mr. Anthony J. Sestric, Attorney for Plaintiff, 120 South Central, Suite 1100, St. Louis, Missouri 63105.

.....

EXHIBIT A

State of Missouri }
City of St. Louis }

AFFIDAVIT OF BURCHARD NEEL, JR. IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Burchard Neel, Jr., being duly sworn depose and states:

1. I am a named defendant in the action entitled Charles Murphy, et al. v. The Board of Education of the City of St. Louis, et al., being cause No. 782-4280 in the Circuit Court of the City of St. Louis and cause No. 78-0628-C(1) in this court.

2. I am the Associate Superintendent in charge of Personnel for the St. Louis Public Schools, having been in Personnel as Director or similar titles at all times since 1973 and also for prior, non-consecutive periods of time.

3. Among my duties is to supervise the operation of the Personnel Division, which has administrative responsibilities over the staff of the public school system, numbering about 6,900 employees, inclusive of certificated and non-certificated personnel.

4. Our Division maintains standard records about the staff, which are kept in the regular course of the public school business. These records include type and location of assignments, race of the employee. Dues check off records for members of the Union and of the St. Louis Teachers Association are also maintained in the central office.

5. Our records show that of the nine plaintiffs in this action six are teachers, to wit, Charles Murphy, Ellen Bordero, Marvin Crader, Rosalind Steel, Betty Turley and Reba Viscuso; two are custodians, namely, Virgil Kolodgie and Florence Claridge; and one is a secretary, Virginia Norris.

6. Our records show that during the period 1975-1976 of the six plaintiffs who are teachers 3 were members of the Union Local 420 and 2 were members of the St. Louis Teachers Association.

7. Of the nine plaintiffs 2 are black (Murphy and Bordero) and the remaining 7 are white.

/s/ BURCHARD NEEL, JR.
BURCHARD NEEL, JR.

Subscribed and sworn to before me this 6th day of July, 1978.

/s/ MARY FRANCES RAYHAWK
Notary Public

My Commission expires: November 28, 1978

APPENDIX 7

United States District Court, Eastern District of Missouri, Eastern Division

Charles Murphy, et al.,
Plaintiffs,
v.
The Board of Education of the City of St. Louis, et al.,
Defendants.
No. 78-0628-C (1)

ORDER

(Filed August 11, 1978)

A memorandum dated this date is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED that plaintiffs' motion to remand be and is denied.

IT IS FURTHER ORDERED that defendants' motion to dismiss be and is granted. Plaintiffs' complaint is hereby dismissed with prejudice.

Dated this 11 day of August, 1978.

/s/ J. H. MEREDITH
United States District Judge

APPENDIX 8

United States District Court, Eastern District of Missouri, Eastern Division

Charles Murphy, et al.,
Plaintiffs,
v.
The Board of Education of the City of St. Louis, et al.,
Defendants.
No. 78-0628-C (1)

MEMORANDUM

(Filed August 11, 1978)

This matter is before the Court on the motion of plaintiffs to remand, and on the motion of defendants to dismiss for failure to state a claim. For the reasons stated hereinafter, plaintiffs' motion to remand will be denied, and defendants' motion to dismiss will be sustained.

This case was originally filed in St. Louis City Circuit Court by nine plaintiffs for alleged deprivation of constitutionally protected rights and for unfair employment practices. The petition also made class allegations on behalf of "all employees of the board" [of education]. The defendants thereafter removed to this court.

Count I seeks a declaratory judgment that defendants' actions in transferring teachers pursuant to a consent decree in *Liddell, et al. v. Bd. of Education, et al.*, Case No. 72-100 C

(1) (E.D. Mo.), are "illegal, invalid, and unconstitutional, and contrary to the laws of the State of Missouri, the United States, and the City of St. Louis."

Count II prays for a restraining order prohibiting the aforementioned transfers. Count III seeks damages of $10,000,000.00.

The Court will first address the plaintiffs' motion to remand. Plaintiffs contend that this action is not subject to the original jurisdiction of the United States District Court under 28 U.S.C.

Section 1331 of Title 28 reads: "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

Section 1343 of Title 28 provides: "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom, or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

Finally, Title 28 U.S.C. §1441(a) allows a defendant to remove any action brought in a state court to the district court where "the district courts of the United States have original jurisdiction."

Subparagraph (c) of that section states that "Whenever a separate and independent claim or cause of action, which would

be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or in its discretion, may remand all matters not otherwise within its original jurisdiction."

The question which must be answered is whether this court would have original jurisdiction of any of the plaintiffs' claims. Although the petition evidences a shotgun approach to pleading, it is apparent that the plaintiffs complain of violations of state law, §292.020, R.S. Mo.; federal law, the 14th Amendment, 42 U.S.C. §§1981, 1983, and 2000e-2; and of St. Louis City Ordinances Numbers 51512 and 57173.

Clearly the plaintiffs' claims for deprivation of rights secured under the 14th Amendment and Sections 1981, 1983, and 2000e-2 of Title 42 are claims "which would be removable if sued upon alone." 28 U.S.C. §1441(c). They would be removable because 28 U.S.C. §1343 (3) and (4) grant the district court original jurisdiction of a civil action "[t]o redress the deprivation, under color of any State law, statute, ordinance, . . . of any right, privilege or immunity secured by the Constitution . . ." or "[t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights . . ."

If the adjudication of a claim depends upon the application of either the Constitution or laws of the United States, the entire case is removable. 14 Wright, Miller and Cooper, *Federal Practice and Procedure*, Jurisdiction, §3722, page 546. *Gully v. First Nat. Bank in Meridian*, 299 U.S. 109 (1936). 28 U.S.C. §1441 (c). Since plaintiffs are clearly alleging violations of the 14th Amendment and of various provisions of the civil rights acts of Title 42, those federal claims may be removed. Furthermore, 28 U.S.C. §1441(c) allows the district court to remove the entire case and also to determine all issues therein. *Watkins*

v. Grover, 508 F.2d 920, 921 (9th Cir. 1974). Therefore, plaintiffs' motion to remand will be overruled and the Court will take jurisdiction of the entire cause.

The Court will next address the defendant's motion to dismiss for failure to state a claim under Rule 12(b)(6), F.R.C.P. Defendants contend they are merely carrying out and implementing a court approved consent decree entered in *Liddell, et al. v. Bd. of Education, et al.*, Case No. 72-100 C (1), (December 24, 1975, E.D. Mo.). The Court agrees.

Paragraph 5 of that consent order, which was approved by this Court, requires the defendants to affirmatively act to reduce the racial imbalance of *teachers* in the St. Louis City school system.

The Court is of the opinion that the teachers can state no claim, federal or otherwise, for the transfers ordered under the consent decree in *Liddell, supra.*

Under Missouri law, the school impliedly has the discretionary right to transfer teachers. See, §168.211(2), R.S. Mo. (1969). There is, therefore, virtually no probability of success on the merits of an equal protection claim where the board has such authority to transfer teachers. *Kolz v. Board of Ed. of City of Chicago*, 576 F.2d 747, 749 n.2 (7th Cir. 1978).

Also supporting this conclusion is the case of *McDaniel v. Barresi*, 402 U.S. 39 (1971). In that case litigation was commenced to raise equal protection claims of students who were reassigned schools by the school board under a voluntary program to desegregate its public schools. The Supreme Court held the plan did not offend the 14th Amendment and that the Board properly took into account race in formulating parts of the plan. *Id.* at 41. It is thereby clear that plaintiffs can state no claim under the 14th Amendment, 42 U.S.C. §§ 1981, 1983, and 2000e-2. *Id.*

Although there is no law on the issue, the Court is of the opinion that the reasoning in *McDaniel v. Barresi, supra*, and *Kolz v. Board of Ed. City of Chicago, supra*, applies by analogy to plaintiffs' claims of unlawful employment practices under state and municipal law. Both the state statute and the city ordinance contain language that closely parallels the federal statutory and constitutional law. Therefore, the Court will dismiss the state and municipal claims for failure to state a claim. There is simply no law or authority to support plaintiffs' contentions or theories.

Finally, it should be noted that the plaintiffs were given ample opportunity to intervene in *Liddell, supra*, but chose not to do so. This fact further supports the determination that plaintiffs can state no claim. See, *Black and White Children of Pontiac School System v. School District of City of Pontiac*, 464 F.2d 1030 (6th Cir. 1972).

Dated this 11 day of August, 1978.

/s/ J. H. MEREDITH
United States District Judge

APPENDIX 9

In the United States Court of Appeals
Eighth Circuit

No. 78-1608

Charles Murphy, et al.,
Appellants,
vs.
The Board of Education of the City of St. Louis, et al.,
Appellees.

MOTION FOR RECUSAL

Comes now Appellants, by counsel, and respectively move under 28 U.S.C. § 455 that the Honorable Circuit Judges Lay and Bright be recused and disqualified from presiding as judges at the appeal of the above-entitled matter.

This motion is made on the grounds that said judges participated and ruled in the case of *Liddell, et al. v. Caldwell*, 546 F.2d 768 (8 C.A., 1976), and that by the contents of the opinion issued in that cause, have disclosed that they have formed a personal bias or prejudice concerning the actions and attitudes of a party, to-wit: the Board of Education of the City of St. Louis, in the following particulars:

1. Circuit Judges Lay and Bright concluded that the Board of Education of the City of St. Louis has operated an "admittedly de jure segregated school system whose district lines have been coterminus with those of the City since 1876." (*Liddell, et al. v. Caldwell, et al.*, 546 F.2d 768, 772 (8 C.A., 1976).

2. Circuit Judges Lay and Bright have previously ordered "in order to avoid future piecemeal appeals, we additionally direct that the district court hear, as soon as possible, any objections to the School Board's January, 1977 plan and that within a reasonable time prior to the entry of its approval, the court require that the parties submit alternate plans. In no event should implementation of plans for a unitary school system be delayed beyond the commencement of the 1977-78 school term." *Liddell, et al. v. Caldwell, et al.*, 546 F.2d 768, 774 (8 C.A., 1976).

And that by reason thereof, Circuit Judges Lay and Bright have prejudged and have formed opinions as to the merits or disputed evidenciary facts concerning the proceeding.

WHEREFORE, Appellants pray an order of this Honorable Court recusing and replacing Circuit Judges Lay and Bright from presiding at the hearing of the appeal of the above-entitled matter.

LAW OFFICES OF ANTHONY J. SESTRIC
/s/ By ANTHONY J. SESTRIC
1015 Locust Street, Suite 601
St. Louis, Missouri 63101
241-8600
Attorneys for Appellants

State of Missouri }
City of St. Louis }

On this 2nd day of January, 1979, before me a Notary Public appeared Anthony J. Sestric, and having been duly sworn by me, stated that the above and foregoing facts and allegations are true and correct to his best knowledge and belief.

/s/ NANCY K. TROUTMAN
Notary Public

My Commission Expires August 22, 1982.

I hereby certify that a copy of the above and foregoing Motion has been served upon the Appellees by depositing the same, postage prepaid in the United States mail this 12th day of January, 1979 addressed to Mr. John H. Lashly, c/o Lashly, Caruthers, Thies, Rava & Hamel, Attorneys at Law, Suite 1300, 818 Olive Street, St. Louis, Missouri 63101, Attorney of Record for the Appellees.

/s/ ANTHONY J. SESTRIC
ANTHONY J. SESTRIC

APPENDIX 10

United States Court of Appeals
for the Eighth Circuit

78-1608 September Term, 1978

Charles Murphy, et al.,
Appellants,
vs.
The Board of Education of the City of St. Louis, et al.,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

Before LAY, BRIGHT and STEPHENSON, Circuit Judges.

Appellants' motion for recusal of certain Judges has been considered by the Court and is overruled.

The presenting setting of this case for oral argument and submission to a panel of Judges of the Court on Thursday, January 11, 1979 remains in full force and effect.

January 5, 1979

APPENDIX 11

United States Court of Appeals
for the Eighth Circuit

No. 78-1608

Charles Murphy, Reba Viscuso, Ellen Bordero, Rosalind Steel, Betty Turley, Virgil Kolodgie, Florence Claridge, Marvin Grader and Virginia Norris,
Appellants,

v.

The Board of Education of the City of St. Louis, Gordon L. Benson, Anita L. Bond, Frederick E. Busse, Henry M. Grich, Betty Klinefelter, Lawrence Moser, Lawrence E. Nicholson, Daniel L. Schlafly, Marjorie Smith, Dorothy C. Springer, Marjorie M. Weir and Donald W. Williams, Constituting and Being Members of the Board of Education of the City of St. Louis and Robert E. Wentz and Burchard Neel, Jr.,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: January 11, 1979
Filed: January 19, 1979

Before LAY, BRIGHT, and STEPHENSON, Circuit Judges.

PER CURIAM.

This is an appeal from a dismissal of plaintiff's complaint by the district court. We affirm the judgment of dismissal for the reasons set forth in the district court's opinion.

The judgment of the district court is affirmed.

Attest:

A true copy.

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX 12

United States Court of Appeals
for the Eighth Circuit

No. 78-1608 September Term, 1978

Charles Murphy, et al.,
Appellants,
vs.
The Board of Education of the City of St. Louis, et al.,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

The Court having considered petition for rehearing en banc filed by counsel for appellants and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

February 6, 1979

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1511

CHARLES MURPHY, et al.,
Petitioners,

vs.

THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, et al.,
Respondents.

BRIEF OF RESPONDENTS

The Board of Education of the City of St. Louis, et al. in Opposition to Petition for Writ of Certiorari

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Respondents.

BRIEF OF RESPONDENTS

The Board of Education of the City of St. Louis, et al. in Opposition to Petition for Writ of Certiorari

QUESTIONS PRESENTED

Petitioners itemize seven questions submitted to this Court. In substance, however, there are only three principal issues which are raised by the petitioners and these will be restated as follows:

1. Whether petitioners' motion for the recusal of Circuit Judges Lay and Bright of the Eighth Circuit on the ground of prejudice against the Board of Education (respondent here) allegedly evidenced in their opinion as appellate judges adjudicating the 1976 appeal in *Liddell, et al. v. Caldwell, et al.*, 546 F.2d 768, and for having formed an opinion as to the merit

of certain facts there involved was properly overruled by the Eighth Circuit.

2. Whether the pending action was properly removed by the respondents on the grounds of (i) federal jurisdiction over the subject matter of the state court petition which charged that the Board's reassignment of teachers was in violation of the Fourteenth Amendment to the United States Constitution and of designated federal statutes, and (ii) of the need to avoid a collateral attack in state court of the Consent Judgment entered by the District Court in the *Liddell* case which ordered the teachers' reassignment plan.

3. Whether the Courts below properly made adjudications in favor of the respondents directing the dismissal with prejudice of the original petition therein.

STATUTES INVOLVED

28 USC § 144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

As amended May 24, 1949, c. 139, § 65, 63 Stat. 99.

28 USC § 455. Disqualification of justice, judge, magistrate, or referee in bankruptcy

(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, magistrate, or referee in bankruptcy shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

As amended Dec. 5, 1974, Pub.L. 93-512, § 1, 88 Stat. 1609.

28 USC § 1331. Federal question; Amount in Controversy; Costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 USC § 1441. Actions Removable Generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be remov-

able without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

As amended Oct. 21, 1976, Pub.L. 94-583, § 6, 90 Stat. 2898.

28 USC § 1443. Civil Rights Cases

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

28 USC § 1446. Procedure for Removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c) The petition for removal of a criminal prosecution may be filed at any time before trial.

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(f) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

28 USC § 1653. Amendment of Pleadings to Show Jurisdiction.

Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts. June 25, 1948, c. 646, 62 Stat. 944.

STATEMENT OF THE CASE

Petitioners' action is an offshoot of the St. Louis schools desegregation case, captioned *Liddell, et al. v. Board of Education, et al.*, Cause No. 72-100 C (1), which has been pending in the United States District Court of the Eastern District, Eastern Division of Missouri since February 18, 1972. This suit was instituted by black parents and their minor children attending the public schools of the City of St. Louis, on behalf of themselves and all their children and parents similarly situated. The complaint in *Liddell* charged the Board of Education and its administrators with racial segregation and discrimination in the operation of the St. Louis Public School System as the natural and foreseeable effect of the assignment of students and teachers, the allocation of educational resources, and buildings.

On December 24, 1975, James H. Meredith, Chief Judge of the United States District Court who had presided over the case since its inception entered the Consent Judgment and Decree which adjudicated the then pending issues upon terms agreed to by the parties (R. App. A).* The Consent Judgment and Decree required a number of steps to be taken by the Board of Education with regard to personnel, location of schools, reduction of racial isolation in the academic high schools and establishing elementary and secondary magnet schools all in an effort to reduce racial isolation in the St. Louis Public School System.

Of primary import in the present case are paragraphs 5 and 6 of the *Liddell* Consent Judgment and Decree, which are set forth in full herein.

> "5. With regard to the personnel of the St. Louis Public Schools, the defendants are directed and ordered to take the following measures which are necessary or proper in order to reduce racial segregation:
>
> (a) Effective before the beginning of 1976-77 school year, defendants shall have planned, developed and carried out a program through volunteers and, if necessary, through mandatory appointments and assignments, to provide a minimum of two regular classroom teachers and no less than 10% of the minority teachers and other staff of either race in each school of the system.
>
> (b) The minimum percentages provided for in the preceding paragraph shall be increased by the defendants by no less than 20% of the minority teachers and other staff of either race in each school of the system before the beginning of the 1977-78 school

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* References to Respondents' Appendix will be indicated as "R. App. . . ." and references to Petitioners' Appendix as "A-. . .".

year, and to 30% of the teachers and other staff before the beginning of the 1978-79 school year.

6. The measures required to be taken by the Board under the provisions of paragraph 5 hereof shall be taken notwithstanding any already assigned and approved contracts; and the tenure or seniority of teachers or other certificated personnel shall not be used to excuse or justify any lack of compliance with the provisions hereof."

The implementation of these provisions of the Consent Judgment and Decree was started immediately after its entry by the district court and has been carried out in accordance with the time schedule set out therein, with minor modifications approved by the district court.

On the same day that the Judgment was entered, the District Court also issued an order that notice of the Judgment be published advising all members of the class and other interested parties that they could file objections to the Judgment and that a hearing would be held on such objections on January 23, 1976.

On January 16, 1976 objections to the Judgment were filed by the Missouri State Teachers' Association, by the St. Louis Teachers' Union Local 420 and others (R. App. B). After a hearing, these objections were overruled by the District Court but neither of the teacher organizations on behalf of themselves or their membership sought to appeal from that ruling or to participate in the proceedings for intervention which were filed by the NAACP (R. App. B). The appeal from the District Court's denial of the intervention application of the NAACP was sustained by the Eighth Circuit Court of Appeals in an opinion written by Circuit Judge Donald P. Lay with Circuit Judge Myron H. Bright and Senior District Judge Talbot Smith, Eastern District of Michigan, on the panel. The style of the case was *Liddell, et al. and Board of Education v. Caldwell, et al.*, 546 F.2d 768 (8th Cir. 1976) (R. App. C), motion to stay mandate denied 553 F.2d 557 (8th Cir. 1977) (R. App. D).

On or about February 2, 1977, these respondents applied to Mr. Justice Blackmun, Circuit Justice for the Eighth Circuit, to vacate the mandate of the appellate court. The Application, which was docketed under No. A-643, was denied by an equally divided Court on February 22, 1977 (Mr. Justice Marshall taking no part in the matter), 429 U.S. 1086 (1977).

Thereafter, the Board of Education filed its petition for certiorari which was docketed as No. 76-1411 in this Court. The petition was denied on June 27, 1977, 433 U.S. 914.

As it was done in the 1976-77 and 1977-78 school years, so when the 1978-79 school year approached the Board undertook to make assignments and transfers of teachers and other staff in order to comply with the last provision of paragraph 5(b) of the Consent Judgment and Decree. After these transfers were announced, and more than six years after the *Liddell* case had been instituted, the petitioners, who had refrained from intervening on either of the two occasions on which the District Court had given notice to all interested parties of their opportunity to be heard, chose to institute the instant suit.

Their petition was filed in the Circuit Court of the City of St. Louis on or about June 12, 1978 (A-1-14). Six of the nine named plaintiffs are teachers, of whom three were members of the Union Local 420 and two were members of the St. Louis Teachers' Association and the time the Consent Judgment and Decree was entered and objections to it were heard by the district court in the *Liddell* case. Two of the plaintiffs are black, and the rest are white (affidavit of Burchard Neel, associate superintendent in charge of personnel, St. Louis public schools, A-44).

The petition below seeks a declaratory judgment that the Board's actions in transferring and assigning employees in com-

pliance with the Consent Judgment and Decree are "illegal, invalid, and unconstitutional, and contrary to the laws of the State of Missouri, the United States, and the City of St. Louis." (A-9). Among the federal statutes pleaded by Murphy, et al. in this connection are 42 U.S.C. §§ 1981, 1983 and 2000e-2 (text set out at A-5). Count II of the petition prays for a restraining order prohibiting the transfers mentioned above, and Count III seeks damages in the amount of $10,000,000.00.

The petition was timely removed by the Board on June 23, 1978, and an amendment by interlineation of the removal petition was granted by the District Court on July 10, 1978 (A-35-37).

The Board's Motion to Dismiss with an accompanying affidavit was also filed on July 10, 1978 (A-38-45). In the motion, the Board asked the court to take judicial notice of the Consent Judgment and Decree in the *Liddell* case and the Board's obligations thereunder (R. App. A). The Board urged the dismissal of this action since the acts complained of were mandated by that Judgment.

Judge Meredith denied the petitioners' Motion to Remand and sustained the Board's Motion to Dismiss on August 11, 1978 (A-47-51). Petitioners appealed to the Eighth Circuit and, when the composition of the panel was announced, filed a Motion to recuse the two Circuit Judges on the panel, Donald P. Lay and Myron H. Bright. The stated ground is their alleged prejudice concerning the Board and evidenced in their decision (i) granting the intervention of the NAACP on December 13, 1976 and (ii) directing the district court to adopt a time schedule for objections (A-52-54). The latter point is apparently abandoned in the proceeding before this Court. Petitioners' motion was duly denied on January 5, 1979 (A-55). After argument, the appellate court, per curiam, affirmed the judgment below on January 19, 1979 (A-56). Motion for Rehearing En Banc was denied on February 6, 1979 (A-57).

ARGUMENT

I. No Conflict With Any Circuit Is Shown Regarding the Denial of Petitioners' Motion for Recusal of Two Eighth Circuit Judges and Said Motion Has No Basis in Fact or in Law.

The main charge raised in the instant petition is that two of the three Judges on the appellate panel to which this case was assigned "improperly failed to recuse themselves in violation of 28 U.S.C. 455" (petition for certiorari, p. 9).

This charge is serious on its face, but is utterly wanting in facts and in law. The alleged facts, which should be the foundation for the charge and argument, are not pointed out with the clarity and directness which would appear required. Seemingly the facts supporting these charges are set out at pages 16 and 17 of the petition and consist of two excerpts from the opinion of the Eighth Circuit in the NAACP intervention proceedings, 546 F.2d 768 (8th Cir. 1976) *cert. den.* 433 U.S. 914 (1977).

The first statement is quoted by petitioners as follows:

> "The parties were faced with an admittedly de jure segregated school system whose district lines had been coterminus with those of the city since 1876." *Liddell v. Caldwell,* 546 F.2d at 772.

The second quotation presented by petitioners states:

> "As we stated earlier, we do not believe that the merits of the Consent Decree are before us, since we consider the decree interlocutory in nature. We do observe, however, that if the overall plan to be submitted by the board contains major deficiencies in the respects asserted, the plan will encounter serious constitutional objection." *Ibid.* at 773.

As to the first quotation, it is true that prior to *Brown* the St. Louis School System was segregated as a result of constitutional and statutory provisions of the State of Missouri. The statement of the appellate court is unclear as to what time period was intended, but the sole issue for decision by the Eighth Circuit in that proceeding was whether or not the NAACP should be allowed to intervene. Hence the court's comments on other matters such as those referred to in the quoted passages of the opinion were purely *obiter dictum*. The appellate court itself took the unusual step to point out in its Order of January 28, 1977 that its holding was limited to the "only issue" of the NAACP intervention, 553 F.2d 557 (8th Cir. 1977) (R. App. D p. 2, our emphasis).

Concerning the second statement cited by petitioners as evidencing the Judges' prejudice, no such statement appears in Petitioners' Motion for Recusal, which is printed at A-52-53, and limits the scope of the issue which petitioners may present to this Court. On the other hand, the second statement relied upon in that motion is not found in petitioners' presentation of the issue at pages 16-17 of their petition. Thus, it would appear that at least 50% of petitioners' argument is not even before this Court.

Secondly, as petitioners themselves note, Section 455 of Title 28 is construed by the Fifth Circuit in *Davis v. Bd. of School Commissioners of Mobile County*, 517 F.2d 1044, 1052 (5th Cir. 1975), as concerned with "conduct extra judicial in nature as distinguished from conduct within the judicial context". In the situation at issue here, petitioners have failed to suggest any extra judicial conduct of any kind on the part of the two Judges. See also *U.S. v. Jeffers*, 532 F.2d 1101, 1112 (7th Cir. 1976), and *U.S. v. Mitchell*, 377 F.Supp. 1312, 1320 (D.D.C. 1974), *affm'd sub. nom., Mitchell v. Sirica*, 502 F.2d 375 (D.C.C. 1974), *cert denied* 418 U.S. 955 (1974).

Thirdly, petitioners' charge fails because as alleged in their Motion for Recusal the prejudice asserted is against the Board of Education, and not against petitioners themselves. The two entities can hardly be considered as interchangeable: the present suit and that they filed shows the petitioners as plaintiffs and the Board with its key administrators as the defendants. How could plaintiffs complain of judicial prejudice *against* the parties they are suing as defendants? Title 28 U.S.C. § 144 provides for the withdrawal of a judge before whom a matter is pending upon a showing by affidavit of a party that the judge "has a personal bias or prejudice either against him or in favor of any adverse party". This statute was not superseded by 28 U.S.C. § 455, but both statutes are to be construed in pari materia as held in *Davis v. Board of School Commissioners of Mobile County*, 517 F.2d 1044, l.c. 1051-1053 (5th Cir. 1975), quoted by petitioners at pages 14-15 of their petition here. The Motion for Recusal, which sets the parameters for this review, pleads prejudice by the two judges concerning the Board of Education as allegedly evidenced in some language of the Opinion. That prejudice can hardly be in favor of the Board which lost the appeal proceeding and applied to this Court for certiorari to the Eighth Circuit. The particular statement of the Eighth Circuit Opinion relied upon by petitioners as indicative of prejudice is certainly not indicative of prejudice in favor of the Board.

Hence petitioners must mean prejudice against the Board. But the Board is an adverse party in this case and since the petitioners were not parties to the 1976 appellate proceeding in *Liddell* before the Eighth Circuit, the statute does not warrant the recusal petition at issue here.

Fourthly, the decisions quoted and relied upon by the petitioners do not support their contentions. For example, in *U.S. v. Cowden*, 545 F.2d 257 (1st Cir. 1977), it was held that "a judge need not recuse himself based on the fact that he

presided over the two prior trials of four co-defendants" (Petition p. 13). A fortiori if such background is no ground for recusal, that decision can hardly be invoked as a precedent to require recusal here because of a procedural ruling on intervention while the merits of the case had been specifically excluded from review (R. App. D).

It is clear that petitioners have failed to adduce any facts or law which supports their position. Far less did petitioners show a conflict of decisions or any overriding points of alleged importance.

II. No Conflict Is Shown by Petitioners Regarding the Rulings Below on the Removal in This Case Whereby the Circuit Court Affirmed the District Court in Protecting Its Jurisdiction Over the Main Case and Overruling Petitioners' Attempt to Collaterally Attack Its Judgment in Another Forum.

Petitioners' question concerning the removability of the original petition in state court is answered by the clear provisions of 28 U.S.C. § 1441. Subsection (a) of that section provides in part that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant . . ." Subsection (b) states in part that actions arising out of the Constitution or laws of the United States "shall be removable." Subsection (c) of § 1441 further provides that when "a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed . . ." Thus, the single issue regarding whether or not removal of this case was proper is "whether this Court would have original jurisdiction of any of the plaintiffs' claims" (Memorandum of Judge Meredith, dated August 11, 1978, A-46). Despite petitioners' suggestion to the contrary,

§ 1441(c) does not limit removability under subsections (a) or (b) but clearly provides that the district court, in its discretion, may take jurisdiction over non-federal claims if they are joined with federal claims. 14 Wright, Miller & Cooper, *Federal Practice and Procedure*, Jurisdiction, Section 3722, page 546.

Petitioners' argument against removability by reason of Section 1441(c) is wrong. In essence, while petitioners claim a violation of federal law, they argue that since state law violations are also alleged the case cannot be removed because there are not "separable and independent claims." Certainly, petitioners' charges of state law violations are independent from the claims of breach of federal statutes and the federal Constitution. If not, the entire case is removable under Sections 1441 (a) and 1441(b) as well as the principles of pendent jurisdiction. 14 Wright, Miller & Cooper, *Federal Practice and Procedure*, Jurisdiction, Section 3724, pages 648-649.

The petition filed by the petitioners in this case complains of alleged violations of Section 296.020 R.S.Mo. and St. Louis City ordinances, Nos. 51512 and 57173. The petition also charges violations of Federal law, the Fourteenth Amendment, 42 U.S.C. §§ 1981, 1983 and 2000e-2. Indeed, those sections are quoted verbatim in the petitioners' petition as filed in the State court (A-3-4, A-6-7). The acts complained of by the petitioners consist of the assignment, reassignment and transfer of employees which petitioners charge to be violations of the Fourteenth Amendment as well as of the federal civil rights statutes which create the causes of action asserted by the petitioners.

The prayer of the petition asks for a declaratory judgment stating that the actions, policies and practices of the Board are "illegal, invalid, and unconstitutional, and contrary to the laws of the State of Missouri, the United States and the City of St.

Louis" (Petition, page 9). Plaintiffs also ask for injunctive relief because of these alleged violations and seek damages in the amount of $10,000,000.00.

28 U.S.C. § 1343(3) and (4) state:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * * * * * *
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

The position of the petitioners that no federal jurisdiction obtains here is extraordinary. In this matter petitioners seek redress for alleged deprivation of rights secured by the Constitution of the United States and by Acts of Congress. They also seek to recover damages and to secure equitable relief under numerous Acts of Congress providing for the protection of civil rights. The Board is a creature of state statutes and thus its actions, policies and practices are obviously under color of state law. Clearly, therefore, the district court had jurisdiction over plaintiffs' claims based upon 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment by reason of 28 U.S.C. § 1343(3)(4).

It is true that the original petition for removal filed by respondents in the federal court did not refer to 28 U.S.C. § 1343(3) and (4). Even so, jurisdiction existed, and removal was proper.

Petitioners challenge the order of removal on the ground that the petition was inadequate without the amendment and that the amendment was improperly granted after the return date for the show cause order issued ex parte by the state court (A-33-34). Petitioners are in error on both points. Significantly no citations whatsoever are furnished by petitioners. Further, petitioners in the same breath ask this Court to determine the permissibility of the procedure below and then abandon the point without discussion, assume the permissibility of the procedures and address the issue of "separate" causes of action (petition for certiorari, p. 18).

Removal was proper and federal jurisdiction existed even without the amendment. See e.g., *Concerned Citizens for Neighborhood School, Inc. v. Board of Education of Chattanooga, Tennessee*, 379 F.Supp. 1233, 1235 (E.D.Tenn. 1974).

Secondly, the removal petition was properly and timely amended. It was filed on June 23, 1978, three days after the service of the *Murphy* petition in state court. The amendment was made by leave of court on July 10, 1978—all within the 30-day period provided in 28 U.S.C. § 1446. It certainly was proper to amend the petition for removal, particularly when the amendment was made within the time period prescribed for the filing of a petition for removal. 28 U.S.C. § 1653. See also *Alexander v. Missouri-Kansas-Texas Railroad Co.*, 221 F.Supp. 897 (W.D.Mo. 1963).

Petitioners' reliance on the return date under the show cause order of the state court as invalidating the amendment granted subsequent thereto is misplaced. 28 U.S.C. § 1446(e) provides that:

> "Promptly after the filing of such petition for the removal of a civil action and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall

file a copy of the petition with the clerk of such State court, which shall effect the removal and *the State court shall proceed no further unless and until the case is remanded.*"

(Emphasis added).

Pursuant to the federal statute the state court loses jurisdiction of the case upon the petition for removal having been filed and served. Clearly this suspension of jurisdiction affects also a collateral matter such as the show cause order involved here. If the arm of a judge whose authority is suspended by federal intervention could block the operation of federal proceedings by orders issued prior to the removal, the removal statutes would be impaired and restrained. See, *Adair Pipeline Company v. Pipeliners Local Union No. 798*, 203 F.Supp. 434, 437 (S.D. Texas 1962), *aff'd*, 325 F.2d 206 (5th Cir. 1963); *Lowe v. Jacobs*, 243 F.2d 432, 433 (5th Cir. 1957), *cert. den.*, 355 U.S. 842 (1957); 14 Wright, Miller & Cooper, *Federal Practice and Procedure*, Jurisdiction, § 3737, p. 743 n. 7; 1A *Moore's Federal Practice*, ¶ 0.168[3.-8], p. 511 n. 24.

Since the petitioners clearly base their purported cause of action upon rights enumerated in the Fourteenth Amendment and various civil rights statutes under federal law, those federal claims may be removed. Here the district court properly removed the entire case and decided all issues in plaintiffs' petition. *Watkins v. Grover*, 508 F.2d 920, 921 (9th Cir. 1974) and cases cited therein; *Gully v. First National Bank in Meridian*, 299 U.S. 109 (1936).

28 U.S.C. § 1331(a) provides in part:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States . . ."

Here again it is clear that there is a federal question since the purported violations complained of arise under the Fourteenth Amendment and several federal civil rights laws.

Moreover, the very authority of the federal district court to enter the Consent Judgment and Decree in the *Liddell* case and the Board's adherence to that Decree is under attack by the petitioners.

The Eighth Circuit in its Order of January 28, 1977 stated: "This court views the consent decree, although interlocutory as to remedy, still obligatory on the respective parties to go forward with implementation of a desegregation plan; . . ." 553 F.2d 557 (8th Cir. 1977) (R. App. D). Similar rulings regarding the obligatory nature of the consent decree were made by Judge Meredith in the course of subsequent proceedings, and were reaffirmed in his after-trial judgment of April 12, 1979 (R. App. E).

Clearly, petitioners have failed to carry their burden that their collateral attack instituted in a state court should be allowed to proceed, in violation of the rules of procedure and substance that govern the orderly administration of the judicial process in this federal system.

Situations, such as presented here where dissatisfied parents, teachers and school children collaterally attack federal desegregation issues in a state forum, are not unusual. When such suits are filed in state court, they may be removed. See for example, *Bohlander v. Independent School District No. 1 of Tulsa County, Oklahoma*, 420 F.2d 693 (10th Cir. 1969) (state action seeking to enjoin actions attempting to carry out the directions of the federal court in desegregation cases are removable); *Burns v. Board of School Commissioners of City of Indianapolis, Indiana*, 302 F.Supp. 309, 311 (S.D.Ind. 1969) *aff'd* 437 F.2d 1143 (7th Cir. 1971) (state action seeking to

enjoin teacher transfers contemplated for following school years in desegregation matter); *Bridgeport Educational Association v. Zinner*, 415 F.Supp. 715 (D. Conn. 1976) (removal of action seeking to enjoin orders in desegregation cases proper); *Grenchik v. Mandel*, 373 F.Supp. 1298 (D. Md. 1973) (district court enjoined state prosecution seeking to stop implementation of certain aspects of desegregation decree).

The district court clearly had original jurisdiction over plaintiffs' claims in this matter, denied petitioners' motion to remand, and within its discretion, retained jurisdiction of the state law claims.

III. **No Conflict Among the Circuits Is Even Suggested by Petitioners, and the Rule That a Court May Take Judicial Notice of Its Own Open File, as Applied in This Case, Is Nowhere Impeached by Petitioners' Argument.**

The gravamen of the Murphy petition filed in the state forum is that the Board had violated and is violating the Fourteenth Amendment to the United States Constitution and various federal civil rights acts by reassigning teachers and other staff personnel on the basis of race. The petition alleges that the reassignments contemplated by the Board at the beginning of the 1978-79 school year would involve about 648 employees out of a total of 7,000 (Petition, paragraph 22, A-28).

Petitioners challenge the very actions taken by the Board in order to comply with the specific provisions of paragraph 5 of the Consent Judgment and Decree which ordered the Board to affirmatively act to reduce racial isolation of personnel in the St. Louis school system and set the required parameters (R. App. A).

Next, petitioners seem to imply that there was something improper in Judge Meredith applying the doctrine of judicial notice of his own file in the then pending *Liddell* case. But the

appellate court's affirmance of the judgment discussing the Murphy petition is nowhere shown to be in conflict with other cases. Indeed, there is no such conflict. See, e.g., *Shuttlesworth v. Birmingham*, 394 U.S. 147, 157 (1969); *National Fire Insurance Co. v. Thompson*, 281 U.S. 331, 336 (1930); *Randy's Studebaker Sales, Inc. v. Nissan Motor Corp.*, 533 F.2d 510, 521 (10th Cir. 1976); *State of Florida Board of Trustees v. Toppino & Sons*, 514 F.2d 700, 704 (5th Cir. 1975), and *Kern v. Tri-State Insurance Company*, 386 F.2d 754, 755 (8th Cir. 1968).

In the present case, the whole effort of the 7 white and 2 black Murphy petitioners is to escape the application of the Consent Judgment and Decree. No wonder they do not seek to appear before the Judge who made that momentous decision in the history of the St. Louis public school system. The Judge also knows full well that the Union Local 420 and the St. Louis Teachers' Association, of which in the aggregate 5 of the petitioners were members, filed written objections to, and argued against, the Consent Judgment and Decree at the hearing on January 21, 1976 (R. App. B). Hence the applicability of the judicial notice doctrine to the instant case is enhanced and made specially appropriate for the reason that here is a federal judge protecting the integrity and enforcement of his prior judgment from a collateral attack, which is as procedurally belated as it is unfounded on the merits.

Petitioners "concede" that the district court could have treated respondents' motion under Rule 12 (b) (6) as a motion for summary judgment under Rule 56. But petitioners contend that the district judge did not elect to do so, hence his conclusion and that of the affirming court of appeals are erroneous.

Suffice it to say, Rule 12(b) mandates that such a motion shall be treated as one for summary judgment when matters outside the pleadings are presented to and not excluded by the court. Here, matters outside the pleadings (affidavit of Burchard

Neel, A-44-45 and judicially noticed matters) were considered. The motion was treated as one for summary judgment and Judge Meredith ruled on the merits of the case.

It is well established that erroneous nomenclature does not prevent the court from recognizing the true nature of a motion, and motions to dismiss have been treated as motions for summary judgment by the appellate courts: see, e.g., *Owen v. Kronheim, Jr.*, 304 F.2d 957 (D. C. C. 1962); *Central Contracting Company v. Maryland Casualty Company*, 367 F.2d 341, 343 (3rd Cir. 1966); and *Dorado v. Kerr*, 454 F.2d 892, 896 (9th Cir. 1972), *cert. den.* 409 U.S. 934.

Moreover, reassignments with race being a factor in the determination of such reassignments in a desegregation program which is voluntarily undertaken by a Board of Education is proper and recognized by this Court to be proper. *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971). While the case of *McDaniel v. Barresi* involved students rather than employees as here, the rationale remains the same.

In the case of *Kolz v. Board of Education of the City of Chicago*, 576 F.2d 747 (7th Cir. 1978), the Court approved the district court who had denied plaintiffs-teachers injunctive relief and noted that: "the plaintiffs had failed to establish deprivation of significant constitution rights, that is, that there is no constitutional right to a teaching position in a particular location." 576 F.2d at 748. The Court further stated there was no probability of success on an equal protection claim where the Board had the discretion to transfer teachers. 576 F.2d at 749, n.2. The same broad discretion is vested in the St. Louis School Board. Section 168.211(2) R.S.Mo. 1969. This point is significantly more cogent in view of the fact that the transfers involved were not only done within the discretionary powers of the Board of Education but by specific order of the district court in the *Liddell* case.

Petitioners' claim of an equal protection violation in the instant case is also invalidated by the fact that there are both black and white employees in the class of plaintiffs (R. App. A-44-45). Furthermore, petitioners purport to represent each and every employee, black and white, in the entire school system (Petition, par. 24, A-28).

The petitioners' position here is a blatant effort to collaterally attack the Consent Judgment and Decree entered by the district court in the *Liddell* matter. Their argument at pages 28-29 of their brief that the two courts below ruled that the petitioners were barred by laches misreads the district court's order affirmed by the Eighth Circuit. In 1976, the plaintiffs had the opportunity to object to the Consent Judgment and Decree including paragraphs 5 and 6 thereto. The district court ordered the publication of a notice containing the text of the proposed decree and gave all interested parties, including these plaintiffs, an opportunity to file objections and to be heard at a hearing on January 23, 1976 (R. App. B). The district court further ordered that the Board adopt the policy of transfer of personnel which was worked out in consultation with the teachers' union and filed in the district court in the *Liddell* case on March 15, 1976 (R. App. B, entry 1/23/1976). No appeal has ever been taken by any of the teacher groups, by any individual teacher, or by any interested party. To reopen the issues of staff balance which were concluded in December, 1975, with implementation completed as to phase I (1976-77) and phase II (1977-78) and in the course of completion as to phase III (1978-79) would be to ask the Court "to grind the same corn a second time." *Aloe Creme Laboratories v. Francine Co.*, 425 F.2d 1295 (5th Cir. 1970).

The Consent Judgment and Decree is presently in effect, and its vitality and binding nature were recently confirmed in the Findings, Conclusions of Law and Judgment rendered by Judge Meredith on April 12, 1979 (R. App. E). The *Liddell* case

and the plans submitted pursuant to the Consent Decree were pending before the district court at the time the *Murphy* suit was instituted. If the petitioners really believed that the Board had failed to comply with the terms of the Decree, and particularly the mandate to the Board to affirmatively act to reduce racial isolation in the St. Louis School System's staff, the logical forum was before the district court in the *Liddell* case, not an independent state court action attacking the district court's order. To allow the prosecution of separate actions attacking the very substance of the Consent Judgment and Decree entered by the district court is not only an attack upon the very integrity of the jurisdiction of the district court and the Court of Appeals for the Eighth Circuit but could result in inconsistent standards and interpretation.

A case similar to that presented here is *Black and White Children of Pontiac School System v. School District of the City of Pontiac*, 464 F.2d 1030 (6th Cir. 1972). In that case, the plaintiffs sought to enjoin the implementation of a prior order. The Court of Appeals for the Sixth Circuit affirmed the dismissal of the complaint on the ground that the plaintiffs' suit was nothing more than an attempt to collaterally attack the district court's prior order in the pending desegregation suit. This is exactly what the plaintiffs seek to do here and the dismissal of the suit and the affirmance of that dismissal was proper.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari to the court below should be denied.

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APPENDIX

RESPONDENTS' APPENDIX A

In the United States District Court for the
Eastern District of Missouri
Eastern Division

Craton Liddell, a Minor, et al.,
Plaintiffs,
vs.
The Board of Education of the City of St. Louis, State of Missouri, et al.,
Defendants.
No. 72C 100(1).

CONSENT JUDGMENT AND DECREE

On this 24th day of December, 1975, the parties hereto having appeared by counsel, and having consented, in the interest of the settlement of this litigation, as well as in the interest of saving the time, burden and expense of further hearings, subject to the approval of the Court, to the making and entering of this Judgment, as per memorandum filed herein under the date hereof, it is hereby

ORDERED, ADJUDGED AND DECREED that:

1. This Court has jurisdiction of the subject matter of this class action and of the parties hereto.

2. This Judgment and Decree is made and entered upon the Stipulation of Facts as amended and supplemented and upon the consent of the parties.

3. Nothing herein contained shall be deemed to be an admission on the part of defendants that the charges contained in plaintiff's Complaint, as amended, are true. However, notwith-

standing the actions taken by the Board subsequent to *Brown v. Board of Education of Topeka*, 347 U.S. 483, as of this date hereof, segregation is present, as a matter of fact, in the Public School System of the City of St. Louis, in the particulars itemized in said Stipulation of Facts.

4. Defendants, their agents, officers, employees and successors, and all those in active concert and participation with them shall be enjoined and prohibited from discriminating on the basis of race or color in the operation of the School District of the City of St. Louis, and shall be required to take affirmative action to secure unto plaintiffs their right to attend racially nonsegregated and nondiscriminatory schools, and defendants will afford unto plaintiffs equal opportunities for an education in a nonsegregated and nondiscriminatory school district, and shall be required to take the affirmative action hereinafter set forth.

5. With regard to the personnel of the St. Louis public schools, the defendants are directed and ordered to take the following measures which are necessary or proper in order to reduce racial segregation:

a) Effective before the beginning of the 1976-1977 school year, defendants shall have planned, developed and carried out a program through volunteers and, if necessary, through mandatory appointments and assignments, to provide a minimum of two regular classroom teachers and no less than 10% of the minority teachers and other staff of either race in each school of the system.

b) The minimum percentages provided for in the preceding paragraph shall be increased by defendant to no less than 20% of the minority teachers and other staff of either race in each school of the system before the beginning of the 1977-1978 school year, and to 30% of the teachers and other staff before the beginning of the 1978-1979 school year.

6. The measures required to be taken by the Board under the provisions of paragraph 5 hereof shall be taken notwithstanding any already signed and approved contract; and the tenure or seniority of teachers or other certificated personnel shall not be used to excuse or justify any lack of compliance with the provisions hereof.

7. Employees of the Board, whether certificated or not, shall not be discriminated against as to hiring, rehiring, promotion, dismissal, suspension or assignment on the ground of race or color, all subject to the procedural provisions of Title VII of the Civil Rights Act of 1964, as amended.

8. To the extent which is consistent with the proper operation of the school system as a whole, defendants shall locate any new schools, lease new classroom facilities or substantially expand existing schools with the objective of eradicating the effects of past and present segregation in the publis schools of the City of St. Louis.

9. Before the beginning of the 1977-1978 school year, defendants shall make a study of realignments of all elementary feeder schools to the academic high schools for the purpose of reducing racial isolation and segregation at the said high schools, and shall submit a report thereon to the Court, on or before January 15, 1977, with implementation to begin September 1977.

10. The defendants are hereby ordered to make a study and report to the Court on or before May 1, 1976 as to whether or not the following items will assist in eliminating or reducing segregation:

a) Establishing elementary magnet schools with specialized curriculum, having an open enrollment by application.

b) Establishing high schools for the study of the visual and performing arts, for the study of mathematics and physical and

natural sciences, and other subject areas, such schools having open enrollment by city-wide application.

c) Recognizing that the above measures are basically experimental in nature, a study of the feasibility of curriculum improvements or other changes that should be instituted in the system as a whole shall be undertaken for the purpose of increasing the quality of education throughout the system, all within the context of reducing racial isolation in the schools and with the goal of desegregating the school system. A report shall be made to the Court by May 1, 1976, with implementation beginning with the school year 1976-1977.

11. Defendants are required to file with the Court, within sixty days from the opening day of the 1976-1977 school year a report setting forth the following information:

a) Tabulation by race of the enrollment in each school of the district.

b) List of each student, by name and address, who applied for transfer stating whether the application was granted, or, if not, the reason for the denial.

c) Tabulation of teachers by race for each school, listing the assigned grade or grades, and the vacancies which have been filled by the hiring of teachers from outside the system at each of the schools.

12. Defendants shall simultaneously mail copies of all reports filed with the Court to counsel for the plaintiffs. Plaintiffs' counsel shall be advised as to actions undertaken by the defendants in compliance with this Judgment.

13. Costs shall be taxed against the defendant Board of Education of the City of St. Louis and a reasonable attorneys' fee and expenses will be allowed against it and in favor of counsel for the plaintiffs.

14. Jurisdiction is retained for the purpose of enabling any of the parties to this Judgment to apply to this Court at any

time for such further orders and directives as may be necessary or appropriate for the construction or carrying out of this Judgment.

Dated this 24th day of December, 1975.

/s/ James H. Meredith
U. S. District Judge

A TRUE COPY OF THE ORIGINAL

Filed 12-24-75

Attest: William D. Rund, Clerk
By Phillip Swihart

Dated: 4-26-79
St. Louis, Mo.

RESPONDENTS' APPENDIX B

United States District Court for the
Eastern District of Missouri

I, William D. Rund, Clerk of the United States District Court for the Eastern District of Missouri, and keeper of the records and seal thereof, hereby certify that the documents attached hereto are true copies of pages 5 and 6 of the Civil Docket Sheet for Case No. 72-100 C (1) Craton Liddell, et al. v. Board of Education, et al. now remaining among the records of the Court.

In testimony whereof I hereunto sign my name and affix the seal of said Court, in said District, at St. Louis, Mo., this 25th day of April 1979.

WILLIAM D. RUND
Clerk

I, James H. Meredith, United States District Judge for the Eastern District of Missouri, do hereby certify that William D. Rund, whose name is above written and subscribed, is and was at the date thereof, Clerk of said Court, duly appointed and sworn, and keeper of the records and seal thereof, and that the above certificate by him made, and his attestation or record thereof, is in due form of law.

April 25, 1979

/s/ J. H. MEREDITH
(Seal) United States District Judge

I, William D. Rund, Clerk of the United States District Court for the Eastern District of Missouri, and keeper of the seal thereof, hereby certify that the Honorable James H. Meredith

whose name is within written and subscribed, was on the 25th day of April 1979, and now is Judge of said court, duly appointed, confirmed, sworn, and qualified; and that I am well acquainted with his handwriting and official signature and know and hereby certify the same within written to be his.

In testimony whereof I hereunto sign my name, and affix the seal of said Court at the city of St. Louis, in said State, on the 25th day of April, 1979.

WILLIAM D. RUND
Clerk

Date	Proceedings
1975	
Oct. 20	By leave, defts Board of Education, et al., replace Exhibit 47 with a revised exhibit also identified as defts' Exhibits 47.
Nov. 13	Data as to the Racial Composition of the student body, teaching and non-teaching personnel in the St. Louis Public School System for the School Year 1975-76, fld.
Nov. 25	Data as to the racial composition of elementary and secondary student in the St. Louis Public School System who were bussed through the school year 1975-76, fld.
Dec. 3	By leave of Court, defts Board of Education, et al., amend Exhibit 47, p. 4, which was filed on 10/15/75 by interlineation. Data updating maps of bus transportation for overcrowding in elementary schools in St. Louis for the school years 1974-75 and 1975-76, and data concerning implementation by school year of the balanced staff policy, fld.

Dec. 23 Stipulation for amendment of pleadings, substitution of parties and entry of appearance of new parties, fld & SO ORDERED.

Dec. 24 Consent judgment & decree & notice thereof, fld. Defts shall be enjoined and prohibited from discriminating on the basis of race or color in the operation of the School District of the City of St. Louis, and shall be required to take affirmative action to secure unto plffs their right to attend racially nonsegregated and nondiscriminatory schools; effective before the beginning of the 1976-1977 school year, defts shall have planned, developed and carried out a program through volunteers and through mandatory appointments and assignments, to provide a minimum of two regular classroom teachers and no less than 10% of the minority teachers and other staff of either race in each school of the system, etc. Order fld. Plffs shall publish a notice in the St. Louis Daily Record, setting forth the text of the said proposed Consent Judgment and Decree and giving notice to all the prospective members of the class and other interested parties that anyone objecting to the said Consent Judgment and Decree shall file with the Court a statement of their objections in writing, etc. cc attys

1976

Jan. 13 Affidavit of publication in compliance with paragraph d) of the order of publication and notice entered into by this Court on Dec. 24, 1975, fld.

Jan. 16 Objections to the plan of desegregating the St. Louis Public Schools System fld by Missouri State Teachers Assn. Statement of St. Louis Teachers Assn to consent Judgment and decree entered on Dec. 24, 1975, fld.

Objections for the purpose of clarification of the consent judgment & decree of Dec. 24, 1975, made by St. Louis Teachers Union, Local 420, American Federation of Teachers along with supporting memo., fld.

Applicant's for Intervention's mtn to intervene as plffs and memorandum of points and authorities in support thereof, and objections to proposed consent decree, fld.

Jan. 16 Five sep. applications for appointment of next friend fld by Cedric Williams and Stephanie Williams, Earline Caldwell, Denise Daniels and Swayne Daniels, Janis Hutcherson, and Robert E. Smith.

Jan. 22 Mtn of defts to dismiss applications for intervention and objections to consent judgment and decree of Dec. 24, 1975, affidavit of Robert E. Wentz, & supporting memorandum, fld.

Jan. 23 Parties appear for hearing on any objections filed to Consent Judgment and Decree entered December 24, 1975. Mtn of plffs in opposition to applicants mtn for intervention to Consent Judgment and Decree of December 24, 1975, filed, together with suggestions & affidavits of Minnie Liddell and Barbara Goldsby, & attached exhibits in support thereof. Document, "To Whom It May Concern" signed by Parker Wheatley, Public Affairs Producer and Consultant, KMOX-TV, fld. Oral argument on objections heretofore filed to Consent Judgment and Decree & on applicant's mtn for intervention heretofore filed by NAACP, commenced & concluded & submitted. The objections heretofore filed to Consent Judgment & Decree are overruled and the application of the NAACP to intervene is denied as untimely. ORDER fld. Objections to the decree are DE-

NIED. School Board shall adopt a policy of transfer for personnel which shall be uniformly applied and shall be filed with the Court within thirty days from date. Mtn of the National Assn. for the Advancement of Colored People by its St. Louis Branch, along with certain minors, DENIED for the reason that the application is untimely. All interested parties desiring to be heard concerning this cause may from time to time file suggestions with the Court and be heard, cc attys

Feb. 5 Mtn for reasonable value of service fld by plffs.

Feb. 9 Transcript of Hearing on the mtn to intervene by the National Association for the Advancement of Colored People, fld.

Feb. 17 School Board granted 20 add'l days from Feb. 23, 1976, to file policy of transfer of personnel with the Court.

Feb. 18 Plff's mtn for reasonable value of service delivered to J. Meredith.

Feb. 20 NOTICE OF APPEAL—fld by NAACP & SPECIAL CONTRIBUTION FUND and Notice of App. & 2 Certified Copies of Docket Entries delivered to USCA (Feb. 23, 1976)

Mar. 15 Statement of policy of the Board of Education of the City of St. Louis of the transfer of personnel, fld.

Mar. 16 Services rendered by Dr. William B. Field, fld.

Mar. 19 Supplementary report services rendered by Dr. William B. Field, fld.

RESPONDENTS' APPENDIX C

United States Court of Appeals
For the Eighth Circuit

No. 76-1228

Craton Liddell, a minor, by Minnie Liddell, his mother and next friend, et al.,
Appellees,
and
The Board of Education of the City of St. Louis, State of Missouri, et al.,
Appellees,
v.
Earline Caldwell, a minor, by Lillie Caldwell, her mother and next friend, et al.,
Appellants.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: November 10, 1976
Filed: December 13, 1976

Before Lay and Bright, Circuit Judges, and Talbot Smith, District Judge.*

Lay, Circuit Judge.

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* Talbot Smith, Senior District Judge, Eastern District of Michigan, sitting by designation.

In February 1972 five black parents and their minor children who were enrolled in the public schools in the city of St. Louis, filed a class action on behalf of themselves and others similarly situated, charging racial segregation and discrimination in the operation of the St. Louis Public Schools. They named as defendants the Board of Education of the City of St. Louis, the board members, the superintendent and district superintendents of the school system. On October 3, 1973, after discovery proceedings by all parties, the trial court allowed the case to proceed as a class action. By public notice the court invited other interested parties to intervene on or before December 1, 1973. No one applied for intervention.[1]

On February 24, 1974, the court requested that the parties file a written stipulation of facts. This was done on June 7, 1974. Exhibits filed with the stipulation have been continually supplemented to provide statistical data for the school years up to 1975-1976. On December 24, 1975, the parties entered into a consent decree which was approved by the trial court, the Honorable James H. Meredith, presiding. At that time the court ordered publication of the judgment to advise all members of the class and other interested parties that they should file any objections thereto by January 16, 1976. Six black pupils, through their parents and friends, and the St. Louis Chapter of the NAACP filed objections and sought to intervene.[2] The original plaintiffs and defendants resisted both the objections and the intervention motion. Following a hearing, Judge Meredith overruled the objections. He denied the application for intervention on the grounds that it was untimely and that the class was adequately represented. He also found that the decree was adequate for the present time and gave all interested parties the opportunity to make additional suggestions to the court from time to time. A timely appeal was taken from that order.

[1] On October 30, 1973, defendants filed their motion for an order directing the plaintiffs to join as additional parties defendant the Governor, the Attorney General, the Commissioner of Education of the State of Missouri, the State Board of Education of Missouri, the St. Louis County Board of Education, the St. Louis County Superintendent of Education, and the twenty school districts in St. Louis County which constitute the first two tiers of school districts adjoining the defendant school district of the city of St. Louis. The motion was denied on December 1, 1973.

[2] On January 16, 1976, objections to the judgment were also filed by the Missouri State Teachers Association and by the St. Louis Teachers Union, Local 420. Neither of these organizations has sought intervention.

The only issue before us concerns the right of the appellants-petitioners to intervene. Although the petitioners urge us to pass upon the constitutional validity of the decree as well, we decline to do so for at least two reasons. First, the decree does not represent a plenary desegregation plan and concededly is interlocutory in scope. Second, the record is deficient as to investigation and scope of possible solutions and plans to implement an effective desegregation order within the St. Louis school system.

After reviewing the record, we conclude that the district court, which has retained jurisdiction of the case, erred in denying the appellants' motion to intervene. For the reasons stated, we do not pass upon the validity of the decree. Nonetheless, reference to the substance of the decree and to the claims of the respective parties is essential to the understanding of our ruling.

The petitioners seek intervention under Fed. R. Civ. P. 24 (a)(2).[3] Intervention of right is required under the rule when: (1) the petitioners assert an interest in the subject matter of the primary litigaiton; (2) there exists a possibility that the peti-

[3] Fed. R. Civ. P. 24(a)(2) reads as follows:

> (a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

tioners' interest will be impaired by the final disposition of the litigation; (3) there exists a danger of inadequate protection by the party representing the petitioners' interests; and (4) the petitioners have made timely application to intervene.

The parties generally agree that petitioners assert valid interests in the subject matter and that unless their interests are adequately represented those interests could be seriously harmed. We note public interest in the operation of a lawful school system and the fact that students and parents, regardless of race, have standing to challenge a *de jure* segregated school system. *See Johnson v. San Francisco Unified School Dist.*, 500 F.2d 349 (9th Cir. 1974); *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969). The denial of the motion to intervene in the present case rests on the alleged lack of timeliness and a finding that the class is already adequately represented.

Recent pronouncements by the Supreme Court[4] and this court[5] govern our consideration of petitioners' timeliness in seeking to intervene. The guiding factors include consideration of the progression of the suit, the reason for the delay, and the possible prejudice any delay due to intervention might cause the existing parties. More significant, however, is the rule that "[t]imeliness is to be determined from all the circumstances" of the case. *NAACP v. New York*, 413 U.S. 345, 366 (1973). Although precedents under Rule 24(a)(2) are helpful, each case must rise and fall on its own peculiar facts and circumstances.

In the present case, it is urged that the petitioners were given ample opportunity to participate in the case from the beginning and were, in fact, invited to intervene before December 1, 1973,

[4] *NAACP v. New York*, 413 U.S. 345 (1973).

[5] *National Farmers' Organization, Inc. v. Oliver*, 530 F.2d 815 (8th Cir. 1976); and *Nevilles v. EEOC*, 511 F.2d 303 (8th Cir. 1975).

by the trial court. Ordinarily this factor standing alone would weigh heavily toward our sustaining the trial court's discretion in declining a petition to intervene made some three years later. *See United States v. Associated Milk Producers, Inc.*, 534 F.2d 113 (8th Cir. 1976). However, in the present case other factors must also be considered.

First, the reason given by petitioners for their failure to intervene earlier is that they concurred with the initial claims, seeking desegregation of the St. Louis school system, asserted by the original plaintiffs. Petitioners claim that there was nothing at that time or at any other time until the consent decree appeared, to indicate to them that these shared claims were "being abandoned." Second, although the original complaint was filed in 1972, the present record is built upon stipulated facts which basically are not under attack; the stipulation appears to fairly set forth the basic history and statistics of the St. Louis school system. The petitioners do not attempt to assert a right to relitigate or undo the factual stipulations of the parties.[6] Third, the record indicates that a good deal of the delay from February 1972 to the time of the consent decree in December 1975 resulted from a stalemate between the parties as to how to achieve a plan of desegregation. Fourth, and of great significance to this court, is the fact that the district court, even as of this late date, has only partially approved specific plans for desegregation. The consent decree signed by the district court is interlocutory in nature, and as all agree, does not constitute the overall plan for desegregation. Under the district court order the school board is to make further study and must produce a "report" by January 15, 1977, with "implementation to begin September, 1977."

[6] There have been extensive discovery procedures culminating in the stipulation. However, we note that when the court originally invited other interested parties to intervene in October, 1973, a great portion of the discovery proceeding had already taken place.

The petitioners' primary purpose in seeking intervention relates to their objections to the proposed remedy, that is, to the ultimate plan of desegregation. The petitioners urge that the consent decree falls short of requiring a plan which would comply with the constitutional mandate to create a unitary school system for St. Louis.

Considering all of these circumstances, and in view of the fact that only partial steps toward implementing a unitary school system have taken place, we find the district court erred in denying the petition for intervention for lack timeliness. Although the time for developing a plan has long since passed, *cf. Carter v. W. Feliciana Parish School Bd.*, 396 U.S. 290 (1970), unfortunately it is readily apparent that the complete desegregation plan is still on the drawing board. The record demonstrates that the effects of the previous *de jure* school segregation are still fully visible within the St. Louis school system.

As a second reason for rejecting the petition for intervention, the trial court found that petitioners' interests are being adequately represented. This finding is vigorously defended by the original plaintiffs and just as vigorously disputed by petitioners.

The controlling rule here is that representation is adequate if there is no collusion between the representative and an opposing party; if the representative does not have or represent an interest adverse to the applicant; or if the representative does not fail in the fulfillment of his duty. *Stadin v. Union Electric Co.*, 309 F.2d 912 (8th Cir. 1962), *cert. denied*, 373 U.S. 915 (1963). *See also Martin v. Kalvar Corp.*, 411 F.2d 552 (5th Cir. 1969); *Peterson v. United States*, 41 F.R.D. 131 (D. Minn. 1966). Petitioners are apparently relying on the third alternative indicating inadequate representation—failure to fulfill duty. In finding that intervention should be allowed, we do not in any way impugn any element of bad faith to the original plaintiffs or the school board by their agreeing to the consent decree. We are confident that all parties, as well as Judge Meredith and the

community at large,[7] have strived in good faith to find a workable solution to the difficult problem before them.[8]

The parties were faced with an admittedly *de jure* segregated school system whose district lines have been coterminous with those of the city since 1876. The total student population for the school term of 1975-1976 was 88,499 with the ratio of students being approximately 70% black and 30% white. Out

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[7] The School Board urges that the consent decree received the overwhelming approval of both races in the community and strong endorsements of the various St. Louis newspapers. The supplemental appendix, containing several newspaper articles printed following issuance of the consent decree, supports this contention. On the other hand, the same articles offer statements which, if true, would seem to support petitioners' contention that the parties have abandoned their goal of obtaining a plan for desegregation. For example:

> *St. Louis Post-Dispatch*, December 24, 1975: "[T]he decree does not include any promises of specific changes besides the teacher transfers. . . ."
>
> *St. Louis Globe-Democrat*, December 26, 1975, (quoting Ernest Calloway, an urban affairs expert and professor): "The whole problem has been one of quality, not whether black children have been going to school with white children."
>
> *St. Louis Sentinel*, January 1, 1976: ". . . Black parents have merely wanted equality in teaching . . ."
>
> *Christian Science Monitor*, January 16, 1976, (quoting Meyer Weinberg, nationally recognized expert on integration and lecturer at Northwestern University): "As long as a school system says 'we're not going to bus,' then they're not really going to desegregate."
>
> *St. Louis Post-Dispatch*, January 18, 1976, (quoting original plaintiff, Liddell): " [I]n a city that is largely black, there might be some all-black schools. But all the children should have top-quality education and the option to go to an alternative school." The paper reports: "She said that she wanted to avoid massive court-ordered busing practice . . . [it would] not necessarily improve the quality of education."

[8] The record reveals that since the consent decree the school district has broadened its magnet school program and has achieved some degree of success in doing so. However, in view of the small percentage of students participating, the magnet school program must be recognized as only an adjunct to a plan of desegregation and it cannot constitute the plan itself.

of 147 public elementary schools in St. Louis the record shows that 121 (82.3%) had enrolled 90% or more pupils of one race. Of these, 87 schools had 90% or more black, and 34 had 90% or more white. Furthermore, 51 elementary schools were 100% black and 15 were 100% white. At the high school level, 12 of the 17 schools (70.5%) were comprised of 90% or more pupils of one race. The enrollment in 11 high schools was 90% or more black and one high school had 90% or more white. Seven high schools were 100% black. Thus, in the entire public school system, a total of 55,713 black pupils were enrolled in schools 90% or more black, and 16,442 white pupils were enrolled in schools 90% or more white. The original complaint filed in 1972, and the proposed findings of fact and conclusions of law submitted by the original plaintiffs, sought an end to the *de jure* dual school system for all students and faculty, and with respect to curriculum. As late as September 1974, the original plaintiffs proposed findings of fact and conclusions of law in accord with the petitioners' claims here.[9]

Petitioners now allege that the plaintiffs have abandoned their original goal. This, they claim, is evidenced by plaintiffs' consent to the entry of the December 1975 decree. One element

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[9] The complaint filed by the original plaintiffs succinctly summarizes the relief sought by their proposed decree of September 1974:

> . . . that this court require the defendants to prepare and submit for approval of this court a plan for the operation of *all the public schools within the defendant Board of Education school system* in conformity with the requirements of the Fourteenth Amendment, including, but not limited to, the non-discriminatory allocation of financial and physical resources; *the establishment of school geographical boundaries and district geographical boundaries which are not racially identifiable; the location, construction and utilization of new buildings and the utilization of existing school buildings* in a manner which are (sic) not racially identifiable; the *assignment of pupil populations,* staffs, faculties, *transportation routes* and activities which are not racially identifiable; and that the plan be effective at the earliest possible date.

(Emphasis added).

of the decree which they specifically attack is its lack of an attempt to integrate any of the elementary or junior high schools. They complain that the decree contains only a general direction to the school board to make a study on the realignment of feeder zones affecting the high schools. The only specifics of the consent decree relating to desegregation of students read:

> ORDERED, ADJUDGED AND DECREED that:
>
> . . . . . .
>
> 9. Before the beginning of the 1977-1978 school year, defendants shall make a study of realignments of all elementary feeder schools to the academic high schools for the purpose of reducing racial isolation and segregation at the said high schools, and shall submit a report thereon to the Court, on or before January 15, 1977, with implementation to begin September, 1977.
>
> 10. The defendants are hereby ordered to make a study and report to the Court on or before May 1, 1976 as to whether or not the following items will assist in eliminating or reducing segregation:
>
> (a) Establishing elementary magnet schools with specialized curriculum, having an open enrollment by application.
>
> (b) Establishing high schools for the study of the visual and performing arts, for the study of mathematics and physical and natural sciences, and other subject areas, such schools having open enrollment by city-wide application.
>
> (c) Recognizing that the above measures are basically experimental in nature, a study of the feasibility of curriculum improvements or other changes that should be instituted in the system as a whole shall be undertaken for the purpose of increasing the quality of education throughout the system, all within the context of reducing racial isolation in the schools and with the goal of de-

> segregating the school system. A report shall be made to the Court by May 1, 1976, with implementation beginning with the school year 1976-1977.

Consent Judgment and Decree, filed Dec. 24, 1975.

On appeal petitioners attack the decree by saying:

> The consent decree is constitutional (sic) inadequate in substance because it provides only for the transfer of personnel to desegregate the faculty of the public school system, and makes no provision for pupil reassignment.
>
> . . .
>
> . . . [T]he decree makes no provision for desegregation of the elementary schools, which are almost totally black in a school system which was previously segregated by state law. The decree includes only a limited opportunity for desegregation of a very few schools through "free choice" enrollment in so-called "magnet" schools. Furthermore, while calling for "studies" of the reassignment of elementary feeder schools, reports of these studies are not due until January 15, 1977, with implementation delayed until September, 1977.

As we stated earlier, we do not believe that the merits of the consent decree are before us, since we consider the decree interlocutory in nature. We do observe, however, that if the overall plan to be submitted by the board contains major deficiencies in the respects asserted, the plan will encounter serious constitutional objection.[10]

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[10] Great stress has been placed by the parties in achieving and improving the quality of education within the St. Louis schools. Although efforts to improve the quality of education for all students is desirable, this emphasis fundamentally misapprehends the constitutional requirement of achieiving a unitary school system. The achievement of quality education is not premised on the equal protection clause of the Fourteenth Amendment. Prior to *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), it had been urged that quality education could be made available to all students without integration. Separate but equal concepts have now long been rejected. Federal courts lack jurisdiction under the Fourteenth Amendment to require quality education in state school districts other than to erase the effects of prior school segregation. The sole goal of *Brown* is to erase the dual educational system and achieve unitary schools. Recognition of equal protection principles under the Fourteenth Amendment is focused on achieving a society that is not divided by skin color; to this end it is important that black and white children accept one another at an early age. *See Brown v. Bd. of Educ., supra*, 347 U.S. at 494; *Kemp v. Beasley*, 389 F.2d 178 (8th Cir. 1968). Segregated school systems have undoubtedly resulted in a loss of *equal opportunity* for quality education for all students. However, it is the "equal opportunity," not the quality education which is germane to the constitutional concern.

In *Davis v. Bd. of School Commissioners of Mobile County*, 402 U.S. 33, 37 (1971), the Supreme Court observed that: "[E]very effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation" must be made by school districts.[11]

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[11] If appellants' objections to the consent decree accurately anticipate the ultimate plan of the school board, we observe that such a plan would fall far short of the desegregation plans now required for the Atlanta, Georgia, and Detroit, Michigan, school districts.

As of September, 1975, the Detroit school district served 247,774 students with a 75/25 black-white ratio. Under the plan approved there 27,524 students were reassigned to integrated schools. The plan changed the racial balance by 105 of the approximately 300 schools in the system. Under the plan no school had less than 30% black students. The Sixth Circuit recently remanded the district court order for reconsideration in an attempt to desegregate further in three black residential areas excluded from the plan, and to integrate the faculties up to a 50/50 ratio. *See Milliken v. Bradley*, 540 F.2d 229 (6th Cir. 1976), *cert. granted*, 45 U.S.L.W. 3363 (Nov. 16, 1976).

In Atlanta, Georgia, in 1975, 85% of students within the district were black, yet the most recent plan approved by the Fifth Circuit requires a 30% mix of black students in previous all-white schools. *Calhoun v. Cook*, 522 F.2d 717 (5th Cir.), *reh. denied*, 525 F.2d 1203 (1975).

The study of these two desegregation plans reveals that under those circumstances complete integration was impossible. Both plans necessarily left several all black schools. Yet such studies disclose that district courts and school boards, facing more difficult problems

In view of the difficult problems in working out a meaningful constitutional plan, we suggest to the district court that it invite the United States Department of Justice to intervene, and that the same invitation be extended to the Missouri State Board of Education. We recommend that the parties explore the creation of a bi-racial citizens advisory committee, which has worked so successfully in other areas of the country. The Supreme Court decision in *Milliken v. Bradley*, 418 U.S. 717 (1974), seemingly deters the merger of two school districts unless racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or unless district lines have been deliberately drawn on the basis of race. *But cf., Newburg Area Council, Inc. v. Bd. of Educ. of Jefferson County, Ky.*, 510 F.2d 1358, 1360 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975). *See also United States v. Bd. of School Comm'rs of Indianapolis, Ind.*, 541 F.2d 1211 (7th Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3372 (Nov. 16, 1976); *Evans v. Buchanan*, 416 F. Supp. 328 (D. Del. 1976), *appeal dismissed*, 45 U.S. L.W. 3393 (Nov. 30, 1976). However, investigation into the voluntary cooperation of the county in accepting minority transfers should not be overlooked. *Cf. Milliken v. Bradley*, 540 F.2d 229, 235, n. 3 (6th Cir.), *cert. granted*, 45 U.S. L.W. 3363 (Nov. 16, 1976).

In view of the delayed implementation of any plan, we direct the district court to immediately grant the appellants' petition for intervention. In order to avoid future piecemeal appeals, we additionally direct that the district court hear, as soon as possible, any objections to the school board's January 1977 plan, and that within a reasonable time prior to entering its approval the court require that the parties submit

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than presently confronting the St. Louis system, are using every effort possible to achieve desegregation of prior *de jure* school systems. It should be obvious that anything less than similar efforts in St. Louis would fall short of constitutional requirements.

alternate plans. In no event should implementation of plans for a unitary school system be delayed beyond the commencement of the 1977-78 school term.

Judgment reversed and remanded for further proceedings in the district court.

A true copy. (Seal)

Attest: Robert C. Tucker

Clerk, U. S. Court of Appeals, Eighth Circuit.

RESPONDENTS' APPENDIX D

United States Court of Appeals
for the Eighth Circuit

No. 76-1228

Craton Liddell, a minor, by Minnie Liddell, his mother and next friend, et al.,
Appellees,
and
The Board of Education of the City of St. Louis, State of Missouri, et al.,
Appellees,
v.
Earline Caldwell, a minor, by Lillie Caldwell, her mother and next friend, et al.,
Appellants.

Filed: January 28, 1977

ORDER

This matter comes before the court on defendant's motion for stay of mandate pending petition for certiorari. The motion is denied and the mandate is ordered to be issued forthwith.

In order for the parties and the district court to fully understand the court's denial of the stay, we set forth our reasoning.

The only issue decided by this court, as specifically recited in the court's opinion filed December 13, 1976, related to the

district court's order denying the petition for intervention. The consent decree requiring integration of the St. Louis School District[1] entered by the district court on the 24th of December 1975, was interlocutory in form. In paragraph 9 of the decree the district court expressly ordered that a further report be made to the court, "on or before January 15, 1977, with implementation to begin September 1977."

The intervenors limited their objections to the decree to the proposed overall remedy and made substantial allegations that the original plaintiffs were not adequately representing the class in obtaining constitutional relief from an admittedly segregated school system. This court allowed intervention to assure the plaintiff class adequate representation and to provide the district court witn meaningful input from all parties to achieve a constitutional plan. The merits of the consent decree were not before this court.

This court views the consent decree, although interlocutory as to remedy, still obligatory on the respective parties to go forward with implementation of a desegregation plan; we assume that in doing so all of the parties will proceed in good faith to make "every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis v. Board of School Comm'rs.*, 402 U.S. 33, 37 (1971).

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[1] Paragraph 4 of the consent decree reads:

> 4. Defendants, their agents, officers, employees and successors, and all those in active concert and participation with them shall be enjoined and prohibited from discriminating on the basis of race or color in the operation of the School District of the City of St. Louis, and shall be required to take affirmative action to secure unto plaintiffs their right to attend racially nonsegregated and nondiscriminatory schools, and defendants will afford unto plaintiffs equal opportunities for an education in a nonsegregated and nondiscriminatory school district, and shall be required to take the affirmative action hereinafter set forth.

Under the decree, the parties have a constitutional obligation to proceed immediately to comply with the district court's order to prepare a plan for its approval and to implement that plan beginning in September 1977. A further stay at this time, particularly in view of the fact that the consent decree is still interlocutory, would simply delay further implementation of that plan and the achievement of equal educational opportunity for the plaintiff class in a non-discriminatory school district.

It is so ordered.

By the Court

A true copy.

Attest:

/s/ ROBERT C. TUCKER
Clerk
U. S. Court of Appeals
Eighth Circuit

(Seal)

RESPONDENTS' APPENDIX E

United States District Court
for the
Eastern District of Missouri

I, William D. Rund, Clerk of the United States District Court for the Eastern District of Missouri, and keeper of the records and seal thereof, hereby certify that the documents attached hereto are true copies of Docket entries for the dates November 30, 1978 thru and including April 20, 1979 in Cause 72 C 100 (1) Liddell, et al. vs. The Board of Education of the City of Ct. Louis, et al., now remaining among the records of the Court.

In testimony whereof I hereunto sign my name and affix the seal of said Court, in said District, at St. Louis, Mo., this 27th day of April, 1979.

William D. Rund
Clerk

I, James H. Meredith, United States District Judge for the Eastern District of Missouri, do hereby certify that William D. Rund, whose name is above written and subscribed, is and was at the date thereof, Clerk of said Court, duly appointed and sworn, and keeper of the records and seal thereof, and that the above certificate by him made, and his attestation of record thereof, is in due form of law.

April 27, 1979.

J. H. Meredith
United States District Judge

I, William D. Rund, Clerk of the United States District Court for the Eastern District of Missouri, and keeper of the seal thereof, hereby certify that the Honorable James H. Meredith whose name is within written and subscribed, was on the 27th day of April, 1979, and now is Judge of said court, duly appointed, confirmed, sworn, and qualified; and that I am well acquainted with his handwriting and official signature and known and hereby certify the same within written to be his.

In testimony whereof I hereunto sign my name, and affix the seal of said Court at the city of St. Louis, in said State, on this 27 day of April, 1979.

William D. Rund
Clerk

Date	Proceedings
Year	
1978	
Nov. 30	Order fld. The mtn of the plff-intervenors and the plff to strike pages 83-88 of defts' reply brief is denied. However, the attachments to the defts' brief are not considered by this Court as being evidence in the case. cc attys
Nov. 30	Oral argument will be had on Friday, Feb. 2, 1979 at 10 AM. (noticed by Ct)
1979	
Jan. 15	Suppl memo of intervening plffs, Adams, et al., fld.
Jan. 15	Suppl brief for plff-intervenor USA, fld.
Jan. 15	Suppl. brief of Missouri State defts, fld.
Jan. 16	Defts St. Louis Board of Education, et al granted until 1/16/79 to file their response to the Court's request for information.

Jan. 16	Response of defts Board of Education, et al, to Court's request for information, fld.
Jan. 24	Notice of adoption of the suppl brief for plff-intervenor U.S. by plffs-intervenors Caldwell, et al, fld.
Jan. 29	Reply suppl brief of Intervening Plffs Adams, et al, fld.
Jan. 29	Reply of defts Board of Education, et al, to supplemental brief of plff-intervenor USA, fld.
Feb. 1	By leave, defts Board of Education, et al, amend by interlineation their brief-in-chief.
Feb. 2	Oral argument commenced & concluded.
Feb. 14	Depo of witness James A. Scott, on behalf of Amici Adams, et al, dtd 5/17/78, fld.
Mar. 13	Transcript of oral argument on 2/2/79, fld by reptr Groh.
Apr. 12	MEMORANDUM WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW (JHM) fld.
	JUDGMENT (JHM) fld. It is ordered that the Board of Education for the City of St. Louis shall within 90 days from the date this becomes a final judgment supplement its plan filed under the consent decree by filing a plan with such changes as the Board deems appropriate under this decision. In formulating such a plan, the Board will consult with and receive the input of all parties to this litigation and such citizen groups as are available and have offered to assist in the implementation of a plan. The Court has specifically found that there has been no intentional segregation of students by the actions or inactions of the Board and that there has been no constitutional violation by the defendants. In light of this finding the Court directs that the formulation of any plan under the consent decree have as its goal quality education which includes

integration of the races where practical and feasible. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the requests of the original plaintiffs and all other intervening plaintiffs who have requested the Court to allow them attorneys' fees and costs be and the same are denied. No attorney's fees are allowed and each party shall bear its own costs. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the request of intervening plaintiffs Adams, et al., to declare unconstitutional the policies of the Department of Housing, Education and Welfare (HEW) concerning the magnet school program is denied for the reasons that the question is moot. Dated this 12th day of April, 1979 (JHM) cc: all attys (2) by mail and hand delivered.

Apr. 13 Page five (5) of Memorandum Opinion mailed to all parties, was missing in original distribution.

Apr. 19 Petition for permission to withdraw as counsel fld. by Forriss E. Elliott and Assoc.

Apr. 20 ORDER (JHM) Granting petition to withdraw.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1511

CHARLES MURPHY, et al.,
Petitioners,

vs.

THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, et al.,
Respondents.

REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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To the United States Court of Appeals for the Eighth Circuit

ARGUMENT

Subsequent to the filing of the original Petition for a Writ of Certiorari, two decisions were rendered which touch on issues before the Court. The United States District Court for the Eastern District of Missouri rendered its decision in the case of *Liddell, et al. v. Board of Education, et al.*, on April

12, 1979. The Memorandum of Findings of Fact and Conclusions of Law appears in the appendix of the Brief of the Respondents in Opposition to the Petition for Writ of Certiorari on page A-29. Specifically the Presiding Judge, Judge James H. Meredith, held:

> "The Court has specifically found that there has been no intentional segregation of students by the actions or inactions of the Board and that there has been no constitutional violation by the Defendants." (Respondents' Brief, page A-29).

Surprisingly enough, after having found no Constitutional violation, the District Court then ordered:

> "In light of this finding, the Court directs that the formulation of any plan under the Consent Decree have as its goal quality education, which includes integration of the races where practical and feasible." (Respondents' Brief, page A-29.)

The issue as to the validity of the Consent Decree as originally proposed in the Petition for A Writ of Certiorari, was whether a Federal Court may judicially require or approve a Consent Decree requiring the assignment and transfer of individuals solely on a racial basis in the absence of a determination that the assignment and transfer is required to overcome prior discriminatory conduct on the part of the employer. (Petition for Writ of Certiorari, page 3.) The issue is now even more clearly defined, and the issue is now whether, in the face of a specific judicial determination that racial discrimination has not been practiced, may a federal district court still order a plan of integration.

The second decision rendered is that of the Second Circuit Court of Appeals in *The Parent Association of Andrew Jackson School v. Gordon Ambach*, 78-7274 (Decided April 17,

1979). The District Court had made a specific finding that the New York School Board had not illegally nor unconstitutionally discriminated against its students or employees, but nonetheless authorized and ordered the School Board to implement a plan the School Board devised to reduce isolation and achieve racial balance. *The Parent Association of Andrew Jackson School v. Gordon Ambach*, 451 F.Supp. 1056, 1077 (S.D. N.Y., 1978). The Second Circuit reversed on the basis that the District had found no liability. Writing for the Second Circuit, Judge Murray Gurfein noted that the Court was "compelled to reverse the district judge's order" requiring achievement of racial balance. ". . . the judge lacked authority under controlling law to compel the school authorities to implement an affirmative plan designed to achieve racial balance." *The Parent Association of Andrew Jackson School v. Gordon Ambach*, 78-7274 (2 C.A. April 17, 1979).

In 1977 the Board of Education of the City of St. Louis filed its Petition for Writ of Certiorari, which writ was denied, 433 U.S. 914 (1977) seeking a review of the decision of the 8th Circuit Court of Appeals in *Liddell, et al. v. Caldwell, et al.*, 546 F.2d 768 (8 C.A., 1976). In its Petition for a Writ of Certiorari, the Board of Education of the City of St. Louis, in part, stated:

> "The Appellate Court erroneously undertook to set binding parameters for the plan to be adopted by the District Court. Not only was there no finding of Constitutional violation made by the District Court, but its findings of fact stand unreversed. Hence the prescription for the remedy set forth by the Appellate Court reaches beyond the scope of the consent judgment and decree without any finding to warrant or support it."

The Respondents here sought, in that case, to overturn the ruling of the Eighth Circuit Court of Appeals, part of which ruling stated the Court's opinion that:

"The Board of Education of the City of St. Louis has operated an 'admittedly de jure segregated school system whose district lines have been coterminus with those of the City since 1876.' " *Liddell, et al. v. Caldwell, et al.*, 546 F. 2d 768, 772 (8 C.A. 1976).

While this Court did not grant certiorari at that time, the issue as to a Federal Court's jurisdiction to order a plan of integration in the absence of a specific judicial finding of intentional segregation was first raised by the Respondents in this case. The issue is even more sharply defined by the decision of Judge Meredith specifically finding no discriminatory intent or constitutional violation on the part of the Respondents here. Given the rather clear differences in the decisions of Judge Meredith and the Eighth Circuit Court of Appeals as to the validity of the Consent Decree and the decision of the Second Circuit, it would be most appropriate for this Court to grant certiorari of this cause. We do not, in any way whatsoever, mean to detract or withdraw any of the earlier arguments made in the original Petition for Writ of Certiorari. The purpose of this supplemental or reply memorandum is merely to bring to this Court's attention a change or continuing development of legal issues which have occurred since the filing of the original Petition for a Writ of Certiorari.

In further support of this point, we would further define and refer to this Court's language in *Regents of the University of California v. Alan Bakke*, 438 U.S. 265, 57 L.Ed.2d 756 (1978). In striking down the racially exclusive admissions policies at the University of California Medical School, this Court stated that it was rejecting the petitioner's comparison to its specific situation to the decisions in school desegregation cases. This Court stated:

"The school desegregation cases are inapposite. Each involved remedies for clearly determined constitutional violations. (Citations omitted.) Racial classifications thus were designed as remedies for the vindication of constitutional entitlement. Moreover, the scope of the remedies was not permitted to exceed to the extent of the violations. (Citation omitted.) Here, there was no judicial determination of constitutional violation as a predicate for the formulation of a remedial classification." *Regents of the University of California v. Alan Bakke*, 438 U.S. 265, 300-301, 57 L.Ed.2d 756, 777-778 (1978).

". . . but we have never approved preferential classifications in the absence of proven constitutional or statutory violations." *Regents of the University of California v. Alan Bakke*, supra, 438 U.S. at 302, 57 L.Ed.2d at 778-779 (1978).

"We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. . . . Without such finding of constitutional or statutory violations, it cannot be said that the Government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm." *Regents*, supra, 438 U.S. at 307-308, 57 L.Ed.2d at 782-783 (1978).

"Respondent urges—and the courts below have held—that Petitioner's dual admissions program is a racial classification that impermissibly infringes his rights under the Fourteenth Amendment. As the interest of diversity is compelling in the context of the University's admission program, the question remains whether the program's racial classification is necessary to promote this interest."

". . . Petitioner's special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity." *Regents*, supra, 438 U.S. at 314-315, 57 L.Ed.2d at 786-787.

"In summary, it is evident that the Davis Special Admission program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of seats in an entering class. No matter how strong their qualifications, quantitative or extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seat. At the same time, the preferred applicants have the opportunity to compete for every seat in the class."

". . . But when a state's distribution of benefits or imposition of burdens hinges on the color of a person's skin or ancestry, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest. Petitioner has failed to carry this burden." *Regents*, supra, 438 U.S. at 319-320, 57 L.Ed.2d at 789-790.

It is therefore the position of the Petitioner that this cause was improvidently removed from the State Court, which has exclusive jurisdiction, that the Motion to Remand was improperly denied, and a Motion to Dismiss was improperly sustained. The Consent Decree, originally resisted by the Respondents here and now embraced by them, may not be approved or imposed by the Federal District Court, since it no longer has jurisdiction of the cause, having found no constitutional violation, and the matter

ought properly be remanded to the State Court for a determination as to the reasons for the classification of the employees of the Respondent by race, and the validity of the decision of the Respondents in this case to assign its employees based exclusively on their race.

Respectfully submitted,

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